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Global Legal Pluralism and Commercial Law

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GLOBAL LEGAL PLURALISM AND COMMERCIAL LAW

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Multiple, overlapping, and systemically interactive normative orders regulate commerce, trade, and finance. A diverse set of state and non-state actors produce a “dense thicket” of rules for transacting in the global economy. (Waldron 2008). How these rules operate, what they are, whether they deserve recognition as what societies usually conceptualize as law, and their historical lineage, are the subject of significant disagreement and confusion. This chapter offers a taxonomy and classification of the sources of norms and ground clearing on the different kinds of norms at work in the global economy.

Part I of this chapter surveys the literature on the history of the law merchant, with a focus on whether a medieval law merchant or *lex mercatoria* existed and if so in what form and content. It explains that while some legal scholars and jurists have offered visions of an “a-national” law merchant going back into at least the Middle Ages, historians are far more careful and skeptical in their findings. It is unlikely that a body of common rules on the substance of commercial law existed in England and across Europe in the Middle Ages, but still the rules of commerce even then displayed substantial pluralism as a mix of rules from different sources on procedure, evidence, dispute resolution, and official rules and privileges applicable to merchants. Part II offers a taxonomy of the plural sources of commercial law existing today. Part III deals with the pluralism of legal orders governing commercial law in the nineteenth century, with the rise of the modern European nation-state. It lays the groundwork for thinking about plurality in present-day commercial law. Part IV explores the debates about the existence of a contemporary law merchant and a transnational commercial law. Part V examines the various schools of thought that have something important to offer to improve our understanding of pluralism in commercial law. It focuses on advances in law and economics, law and society, positivist accounts attempting to elucidate the conditions in which plural commercial law orders might be understood to be legal in concept, and critical accounts questioning whether plural orders in commerce and finance promote power, ideology, and injustice. Part VI explains how soft law dominates the regulation of global finance and banking. Part VII offers predictions of future domains for plural normative orders governing commerce and finance, in particular with the rise of digital technologies.

I. THE CONTENTIOUS HISTORY OF THE LAW MERCHANT

A widely accepted version of the history of the law merchant that many commercial lawyers, arbitrators, and economists accept is that in the Middle Ages, a coherent body of substantive mercantile law existed in England and across continental Europe, autonomous in nature, produced entirely outside of official courts and independent of the laws and edicts of monarchs, governing trade across vast distances and in local fairs and towns, which Lord Mansfield eventually incorporated into English common law, or which legislation rendered ineffective or invisible in the nineteenth century. This substantive body of commercial law is known, at least in the English language literature, as the medieval law merchant or *lex mercatoria*. The consensus among legal historians is that this version of history is seriously lacking in evidentiary support. There is scant evidence of an autonomously generated legal system for commerce in the Middle Ages. Rather, the rules governing commerce of the past were a mix of expeditious procedure, local market privileges granted to merchants by lords and abbots, and location and trade specific ways of doing business not rising to the level of binding general rules. According to Emily Kadens, “[t]he historical *lex mercatoria* was not a single, uniform, essentially private legal system, but rather *iura mercatorum*, the laws of merchants: bundles of public privileges and private practices, public statutes and private customs” (Kadens 2004). There was no incorporation of a body of jurisprudence into the common law, but rather, evolution of the common law itself.

That a misleading picture of the medieval law merchant is offered in some of the literature does not mean that no pluralism existed in the norms governing commerce in the Middle Ages. The historical evidence supports a more modest thesis that the rules of commerce of the time were plural in nature in that they were a mix of official law, some mainly local merchant custom, dispute resolution in fair courts for a time, the dispensation of official privileges for merchants to trade in fairs and towns, and the use of merchant practices in the pleading of forms of action in common law courts. The mix of official and unofficial rules and state engagement and support very generally resembles the current situation for transnational commercial law, discussed in Part IV below.

The earliest known mention of a *lex mercatoria*, or what came to be known as the law merchant, was in a late thirteenth century work now known as the *Little Red Book*

of *Bristol* (Basile, Bestor, Coquillette, & Donahue 1998). The use of the term was unique to England. In Germany, one might see the phrase *jus mercatorum* used to refer to a set of pre-code sources of special rights and privileges for merchants. (Cordes 2005)(Kadens 2015). The Red Book “is both an instructional manual on how to conduct a mercantile court and a series of recommendations on how to improve the process in such courts” (Basile, Bestor, Coquillette, & Donahue 1998) Its author appears to have been the recorder of the City of Bristol, an official of the royal courts, sometimes sitting as a judge, whose main responsibilities were in recording legal proceedings for the King. Beyond the *Little Red Book*, occasional passages appear in the records of various fair courts and in various decrees and documents but they reflected an evidentiary, procedural, and local character for the law merchant (Cordes 2005)(Kadens 2015). In *The Carrier’s Case* decided in 1473, Chancellor Robert Stillington is reported as stating that the *ley marchaunt* is the same thing as the *lex naturae*, a “universal law throughout the world” (Baker 1979).

Not until seventeenth century England do we see evidence of some movement to define a law merchant as a universal body of substantive legal doctrine with binding force beyond any locality or kingdom. As explained in an influential treatise on the subject, the medieval law merchant was “essentially a creation of seventeenth-century lawyers, and common law lawyers at that.” (Basile, Bestor, Coquillette & Donahue 1998). The idea of a law merchant was deployed historically to resolve political conflicts. For example, in his early 1600s work, *The Question Concerning Impositions*, Sir John Davies argued that the law merchant is a part of the law of nations, an argument he used to support the King’s power to impose duties on imported goods. Davies had a political motive: to support the Stuart monarchs to levy revenue through royal prerogative and without the need to obtain the consent of Parliament. (Basile, Bestor, Coquillette & Donahue 1998)(Kadens 2012)(Kadens 2015)(Foster 2005). In 1622, Gerald Malynes’ polemical work, his *Consuetudo vel Lex Mercatoria*, was first published. It took sides in a jurisdictional dispute between the then Admiralty and Chancery courts and the King’s Bench on who should decide merchant disputes. For Malynes, the law merchant was “Customary Law approved by the authorie of all Kingdomes and commonweales, and not a Law established by the Soveraigntie of any Prince, either in the first foundation or by continuance of time.” (Malynes 1622). The resolution of merchant disputes therefore belonged not in the

common law courts but in the courts that aligned more closely to civilian law (Basile, Bestor, Coquillette & Donahue 1998)(Kadens 2012)(Kadens 2015)(Kadens 2004)(Baker 1979).

These attempts to elevate the law merchant can be understood from the nature of the sources of law in the Middle Ages. Up to about the beginning of the nineteenth century, it was common for lawyers to distinguish three forms of law, which followed a rank order of priority. First in rank was divine or eternal law, known only to God. Second was the law of nature, the law governing every action in the natural world, which was to be accessible to rational beings but about which there was debate and disagreement. The law of nature was independent of one's culture or society. Last in rank was positive law, created by humans in their kingdoms, principalities, and cities (Pagden 2013). Not every medieval lawyer accurately described the law in these terms, but this was the basic general schema. An early common law judge would typically employ both natural law and positive law in their decision making. To elevate the law merchant to the status of the law of nature was to give it a higher status than the King's law, the common law. To talk of a "system" of law in the historical context of the Middle Ages, a concept really of our time and not of theirs, was to talk about procedural differences (Baker 1979).

The historical evidence informs that the medieval law merchant differs considerably from a substantive body of mercantile rules transcending societies. Medieval merchant codes consisted largely of rules on procedure observed in cities and towns, whose fair or town courts operated with the permission and under the protection of official authority, either the King or the local authority (Kadens 2012)(Kadens 2004)(Sachs 2006)(Baker 1979). These procedures were also employed in the King's courts (Baker 1979). According to Baker, "[t]he medieval law merchant was not so much a corpus of mercantile practice or commercial law as an expeditious procedure especially adapted to the needs of men who could not tarry for the common law" (Baker 1979).

To understand how merchants used custom in legal proceedings in the Middle Ages, we must understand how merchants resolved disputes in the courts using the forms of action of the common law, used in England until the early nineteenth century. The law merchant procedures got merchants around some of the restrictions of the forms of action, delays in due process, and common law juries. (Baker 1979).

But merchants did not entirely avoid the common law courts. An example of how a merchant procedure might differ from one typically used in early common law is in restrictions on the use of the wager in the merchant context. In common law courts of the Middle Ages, one could deny the existence of debt by swearing an oath to the court, along with the oaths of twelve neighbours or compurgators, denying the existence of the debt. Merchant law specified a different procedure, usually a tally with two or more witnesses (Burdick 1902). But the action in both cases was in debt, a form of action in the early common law.

Evidence exists that merchants sued primarily on sealed obligations, loans, and on account. There is no historical evidence that they sued on instruments such as the bill of exchange until the sixteenth century, but this was more likely due to the severe restrictions imposed by the forms of action and on what might get included in court records as a result and from the fact that bills were considered evidence of an obligation at the time and not an obligation on their own. We must look at the history of contract law to understand what happened. The action of *assumpsit*, which eventually gave rise to actions for breach of contract, relaxed common law procedures for merchants to be able to sue beyond debt and covenant. *Assumpsit* actions were on the rise in the sixteenth century. Merchant suits for payment of bills of exchange were more amenable *assumpsit*, which offered more leeway to plead more facts about bills of exchange. These facts started to appear in judicial records of the time. The King's Bench of the time began to assume competence over a wide range of merchant transactions based on the *assumpsit* action. This was not "incorporation" of the law merchant into the common law but a series of evolutionary procedural moves. It may have been the product of jurisdictional competition. As Baker explains:

No doubt the court was not averse to capturing some of the business of the admiralty and borough courts and diverting mercantile business from the Council and Chancery. Yet there is no evidence of any idea that the King's Bench was incorporating some distinct body of law merchant. . . . The King's Bench had merely removed the procedural barriers which has in the past prevented the two benches from enforcing such transactions in a direct way. This amounted, no doubt, to a substantial change in the common law. But it was part and parcel of the general development of *assumpsit*, to enable the enforcement of all parol undertakings. And since there was no set formulae in *assumpsit*, it was possible to adapt its forms to charge the various parties to bills of exchange (Baker 1979).

The role of the early common law forms of action was opaque to future conceptions of the law merchant, no doubt because most lawyers have long lost contact with forms of action, which were eliminated in England in the early nineteenth century and sometime later in the United States. Lord Mansfield who was the Chief Justice of the King's Bench in the latter 18th century, is most widely credited with incorporating the law merchant into the common law. Incorporation of a substantive body of rules known as the law merchant became the prevailing account. Lawyers accepting this account run the gamut and include Karl Llewellyn, who used incorporation as an important policy underlying the American Uniform Commercial Code.

In the early American republic, the orthodoxy of a cosmopolitan law merchant was well accepted. Early American jurists accepted the notion that the law of nations or *jus gentium* included the law merchant, the law maritime, and a body of principles applicable between states known as the law of nations (Dumbauld 1955)(Janis 2010). This is an erroneous use of the concept of *jus gentium* but the confusion about the meaning of this term was prevalent at the time (Waldron 2012). In 1836, Pennsylvania enacted a statute forbidding citation of English post-revolutionary cases, except "any precedent of maritime law, or of the law of nations" (Dumbauld 1955). In *Swift v Tyson*, 41 U.S. 1 (16 Pet) 1 (1842), in an opinion by Justice Joseph Story, the US Supreme Court held that in cases in which jurisdiction is based on diversity of citizenship, US courts did not have to follow state common law but could instead rely on the law merchant. Justice Story relied on an English rather than a New York case for the proposition that a holder of a properly endorsed negotiable instrument takes the instrument free of defenses of the makers of the instrument. Story's famously quoted Lord Mansfield and Cicero: "The law respecting negotiable instruments may be truly declared in the languages of Cicero, adopted by Lord Mansfield in *Luke v. Lyde*, 2 Burr. 883, 887, to be in a great measure not the law of a single country only, but of the commercial world. *Non erit alia lex Romae, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore una eademque lex obtinebit.*" Nearly a century later, in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the Supreme Court overruled *Swift*, declaring no federal common law existed, though by the time the Court decided *Erie*, Story's reasoning had been distorted through evolution in judicial decision making and through a gradual change in the conception

of legal sources by lawyers and judges. Notably, the New York court that Story overruled also declared that it was deciding the case based on the law merchant. According to Tribe, “*Swift* . . . did not look to a source of law different from that referred to by the state courts; at most, it differently interpreted the same source” (Tribe 2000). What happened in *Erie* is courts stopped applying a “general law” and began to apply a “common law” as they saw it – this eventually became the common law of each state (Tribe 2000)(Coquillette 2005).

Before Christopher Columbus Langdell introduced the case method in American legal education, there was David Hoffman’s *A Course of Legal Study*. (Hoffman 1817). In contrast to Story’s conception of a cosmopolitan law merchant was Hoffman’s cautious approach. Story supported the use of Hoffman’s text in teaching the first law course at Harvard Law School and was pleased to see that Hoffman included a section on the *lex mercatoria* in the readings (Coquillette 2005). At least in the first edition of his text, Hoffman expressed concern to students about the possibility of being misled on discerning the principles of the *lex mercatoria*. He distinguished between the common law method of proving local or particular custom, requiring special pleading and a finding by a jury, with incorporation of merchant custom into national law by courts. Hoffman seemed to accept the notion that *lex mercatoria* has a national character, that the *lex mercatoria* of, say, England, might differ from that of Germany (Coquillette 2005). In his second edition, Hoffman moved the discussion of the *lex mercatoria* to the Roman and civilian parts of this text, perhaps because the American treatises of the time distinguished a uniform law merchant from an English version grounded in the common law (Coquillette 2005). If anything, these differences between Story and Hoffman show is a how a nuanced diversity of views existed about the nature of the *lex mercatoria* in the early nineteenth century.

William Holdsworth’s magisterial seventeen-volume *History of English Law* is equivocal in his description of the history of the law merchant. Holdsworth writes about the “cosmopolitan character of the Law Merchant” though he acknowledges that “usages differed from place to place,” but that it was generally recognized that the law administered by mercantile courts was “a special law merchant, differing from the ordinary law” — a “species of *jus gentium*” rather than “the law of a particular state.” (Holdsworth 1907)(Sachs 2006)(Baker 1979)(Foster 2005). For Holdsworth,

the law merchant had to be cosmopolitan to meet merchant needs and must have arisen naturally to meet those needs, though the evidence fell short (Sachs 2006).

According to a definitive work on German codification in the nineteenth century, the “first great national code of the century” was the German Commercial Code of 1861 (John 1989). Because of the importance of freedom of commerce to German unification, “[i]t was hardly fortuitous that the Confederation’s attentions should have turned first to commercial law” (John 1989). Levin Goldschmidt was a leading figure in Germany’s commercial codification and Germany’s civil code to follow.

Goldschmidt was a disciple of the Savigny historical school. He wanted to install a law based on the German *Volk*, on custom, including merchant custom, as a kind of immanent law which he believed codes should reflect. According to Goldschmidt and as found in Karl Llewellyn’s *The Common Law Tradition*:

Every fact-pattern of common life, so far as the legal order can take it in, carries within itself its appropriate, natural rules, its right law. This is a natural law which is real, not imaginary; it is not a creature of mere reason, but rests on the solid foundation of what reason can recognize in the nature of man and of the life conditions of the time and place: it is thus not eternal nor changeless nor everywhere the same, but is indwelling in the very circumstances of life. The highest task of law-giving consists in uncovering and implement in this immanent law (Goldschmidt 1857)(Llewellyn 1960).

Goldschmidt is widely quoted in English translation as finding a “grandeur and significance of the medieval merchant” and in the merchant creating “his own laws out of his own needs and his own views” (Goldschmidt 1857). Goldschmidt saw medieval merchant courts as “judicial organs of merchant legal consciousness,” incorporating commercial custom into their decision making. Unlike Story, he was repulsed by the idea of taking law from above, from “right reason,” the Romans, or any statute giver. Codification was not to impose a legislative solution alien to merchant communities but to convert merchant custom into the law of the state in the form of a code (Sachs 2006)(Whitman 1987). Goldschmidt influenced Karl Llewellyn, the chief architect of the American UCC, whose ideas on incorporation of merchant custom, immanent law, the importance of facts, and merchant juries bear a remarkable similarity to Goldschmidt’s work (Whitman 1987).

In his influential, *An Early History of the Law Merchant*, published in 1903, Mitchell characterised the law merchant as the “private international law of the middle ages” (Mitchell 1903). He relied on both Goldschmidt and Davies for his

arguments, though their positions are irreconcilable (Sachs 2006). He aligned with Davis that the law merchant is part of "the law of nature and nations," derivable from the "rules of reason" and "the same in all countries of the world, although he found Davies' description may be "too sweeping" (Mitchell 1903). Mitchell accepted Goldschmidt's claims about "the grandeur and significance of the medieval merchant" and about the merchant creating "his own laws out of his own needs and his own views." According to Mitchell, the law merchant, "was a body of rules and principles . . . distinct from the ordinary law of the land" (Mitchell 1903). Mitchell's work was influential and was cited by Holdsworth and others (Sachs 2006).

At about the same time as Mitchell's book was published, John Ewart offered a skeptical view about the law merchant as a body of law independent of the state in his book, *An Exposition of the Principles of Estoppel by Misrepresentation* (Ewart 1900). The main lines of Ewart's argument proceed as follows:

What then is this law merchant which opposes itself to the common law and dominates it? And whence does it come? As a matter of fact, and not merely of phrase, may we not even ask whether there is a law of merchants in any other sense than there is a law of financiers or a law of tailors? Frequent use of the word has almost produced the impression that as there was a civil law and a canon law, so also there was somewhere a "law merchant," of very peculiar authority and sanctity; about which, however, it is now quite futile to inquire and presumptuous to argue.

If the custom of merchants as to bills of exchange was recognized by the courts, so also has the custom of financiers as to the "negotiability" of bonds and scrips been recognized; but no one would think of referring to the "law financier" in speaking of that "negotiability." The custom of financiers, as of social clubs or other organizations or coteries, is observed and enforced by the law; not because the financiers or clubs enacted or had power to enact laws, but because it is with reference to those customs that the parties have acted or contracted; and it is with reference to them, therefore, that rights and liabilities ought to be adjusted. When these or any other customs obtain general acceptance by the community they then pass into and for the first time become laws (Ewart 1900).

So, Ewart's argument is that there is no independent body of law merchant out there as with the status of law. Rather, it is that the law recognizes merchant custom to enforce rights and obligations that merchants want to have enforced in their contractual relationships. Ewart's positivism questions the existence of a law merchant, presaging critiques of the law merchant notion by prominent English jurists such as Lord Mustill and FA Mann, discussed in Part IV below (Mustill 1988)(Mann 1986)(Mann 1984). Francis Burdick challenged Ewart's positivist critique, relying on

the standard accounts of the law merchant by Malynes and others (Burdick 1902). Ewart replied (Ewart 1903).

Soon after Ewart's publication of his book, we see a return to a romantic vision of the law merchant in Wyndham Anstis Bewes' *The Romance of the Law Merchant* (Bewes 1923). Bewes offered a sentimental vision of the law merchant as entirely distinct from the common law, originating in Antiquity, and making its way to all of Europe through the great international fairs. It is widely acknowledged that the work fails to rest on evidence. It appears to have been an attempt to bolster the prestige of commercial and commercial barristers (Donahue 2004). The word "romance" is now widely used as a shorthand to critique descriptions of the historical law merchant as a body of substantive transnational commercial law.

This takes us roughly to the mid-twentieth century. Other scholars could be covered. The historian L. Stuart Sutherland for example, has argued that merchant courts were not independent of the common law courts in England, having only a "limited devolution of authority," that the law merchant was of questionable existence because it lacked the independent existence of the Canon Law until civilian jurists such as Straccha and Scaccia began to standardize custom, that the law merchant is really civilian in character, and that in England its boundaries were determined by the development of the concept of a law of nations (Sutherland 1934). We have covered the most influential body of historical thought on the law merchant. We will now move on to current debates.

Harold Berman gave the medieval law merchant fiction renewed momentum in his influential *Law and Revolution*, published in 1983. Berman should be credited with bringing reflection on global legal pluralism to the historical study of the law, though his characterizations of the law merchant are flawed. He argued that Blackstone identified a significant number of overlapping plural sources of law prevalent in England, which included natural law, divine law, the law of nations, English common law, local customary law, Roman law, ecclesiastical law, the law merchant, statutory law, and equity (Berman 1983). Berman devotes a chapter to mercantile law, in which he discusses a "crucial period of change" with the rise of trade in the eleventh and twelfth centuries. According to Berman, it was in these centuries that the law merchant in the West developed into an "integrated, developing system, a *body* of law" and "a general body of European law . . ." (Berman 1983).

According to Berman, the new commercial law was both a cause and an effect of the rise of commerce of the time. “[T]he new jurisprudence . . . provided a framework for institutionalizing and systematizing commercial relations in accordance with new concepts of order and justice.” It was a “total transformation of commercial law” (Berman 1983). According to Berman, the medieval law merchant was a rational, systemic order. It shared with “other major legal systems of the time the qualities of objectivity, universality, reciprocity, participatory adjudication, integration, and growth” (Berman 1983). Describing the history of commerce built on “an ongoing autonomous customary legal order, Berman and Dasser would later argue:

Nobody denies that there is a body of international rules, founded on the commercial understandings and contract practices of an international community principles composed of mercantile, shipping, insurance, and banking enterprises of all countries. That body of rules antedates the emergence of strictly separated national legal systems; it has never ceased to exist; moreover, it is continually being developed. It should be recognized by national legal systems as customary law. . . (Berman & Dasser 1998).

Berman’s account of the historical law merchant is disputed. According to Emily Kadens: “[t]he evidence strongly suggests that Berman’s classic account is at least partly inaccurate in almost every respect. The law merchant was not a systematic law; it was not standardized across Europe; it was not synonymous with commercial law; it was not merely a creature of merchants without vital input from governments and princes” (Kadens 2004); *see also* (Cordes 2005).

Around the same time as the publication of Berman’s *Law and Revolution*, several authors argued for a cosmopolitan and universal law merchant to have arisen in the early Middle Ages. These authors, notably Bruce Benson and the early work of Leon Trakman, sought an explanation of the historical law merchant in a form of Hayekian spontaneous order. (Benson 2011)(Benson 1998)(Benson 1989)(Trakman 1980)(Trakman 1983), *but see* (Trakman 2011a)(Trakman 2011b). According to Benson, “[v]irtually every aspect of commercial transactions in Europe was governed for several centuries by this privately produced, privately adjudicated and privately enforced body of law” (Benson, 1998)(Benson, 1989). According to this story, this private and spontaneous order ended beginning in the 17th century when states began to promulgate commercial legislation and “nationalise” commercial law, ending its universal and cosmopolitan character (Trakman 1983). While without the overt libertarian ideological underpinning, the school of New Institutional Economics,

pioneered by Nobel Laureate Douglass North, accepted the historical law merchant story, giving it credence as explaining how the law merchant as an institution could facilitate trust and cooperation and reduce transaction costs (North 1990)(Milgrom, North, & Weingast 1990). Most mainstream economists take a narrow approach, looking for institutions to develop trust and facilitate cooperation in particular contexts, and often look for political economy explanations for merchant engagement with political authority.

Despite the evidence, the historical law merchant orthodoxy is accepted from a diversity of scholars working in differing traditions, from Roberto Unger to Richard Posner. *See* authorities collected in (Sachs 2006) and (Kadens 2012). Given the weakness of the actual evidence of a law merchant in history, why its widespread acceptance? Debates between romanticists and skeptics about the existence of a substantive body of transnational law known as the law merchant has persisted into the twenty-first century (Bederman 2010). Proponents and critics can be categorized along several lines. There appears to be a persistent difference of opinion between legal historians and some legal scholars on the history of the law merchant (Schill 2014). Kadens catalogues the disagreement as between evidence-driven historians and some bias-driven legal scholars (Kadens 2012). Kadens explains that the romantic vision “does not correspond to the historical facts” (Kadens 2015). For Abrecht Cordes, “the legal historian is forced to water the wine of *Lex mercatoria* euphoria and state that this use of a legal system of the past is both inconsistent and unhistorical” (Cordes 2005).

This Part I only covers the *historical* debate. Part IV below covers the debate about whether a *contemporary* law merchant exists. History, however, matters. The historical debate is important because scholars employ it as justification for at least two positions: (1) private ordering in the form of an autonomous law merchant can be successful and, in some cases, superior to public ordering in the form of the law of the state and (2) a contemporary law merchant exists as an ancestor to a medieval law merchant, which still has normative force in transnational business disputes. Two groups of lawyers and jurists make these arguments: (1) libertarian-oriented lawyers and economists and (2) international arbitrators. Bruce Benson, for example, makes the libertarian case that the law merchant “effectively shatters the myth that government must define and enforce ‘the rules of the game’” (Benson 1989)(Benson

2011). International arbitrators who prefer more discretion to decide international commercial and investment arbitration cases freed from the municipal law of states have argued that because conflicts of laws rules came into existence only with the rise of nation-states in Europe, then surely there must have been some antecedent law governing commerce (De Ly 1992)(Schmitthoff 1981). They argue that the “a-national” law merchant of old was somehow inappropriately replaced through nationalization of commercial law through codes, legislation, and judicial incorporation, a “hostile process” rendering the law merchant invisible to lawyers and in “hibernation,” though somehow the business community still produces it (Goldman 1983)(Toth 2017).

The deployment of historical argument is an attempt to give these accounts “historical legitimacy” and “symbolic power” (Kadens 2012)(Basile, Bestor, Coquillate, & Donahue 1998). According to Kadens, “[t]he story simply holds too much symbolic power for modern advocates of private ordering looking to give the underpinning of historical legitimacy to their political and economic theories about how law is and should be made” (Kadens 2015). Nikitas Hatzimihail argues that history “adds to the symbolic capital of *lex mercatoria* and confers on it (and stakeholders) a venerable pedigree. It also provides a blueprint for the future, as the modern *lex mercatoria* is presented in the genealogical narratives as either the reincarnation (rebirth) of the ancient law merchant or as the result of its evolution. The power of this historical imagery masks its weak historical validation” (Hatzimihail 2008). She goes on to ask why the historical evidence has not changed views? She explains:

That the mercatorists’ historical imagery persists in spite of these refutations suggests that what matters, for the debate, is not so much what actually happened, but what projections into the past align best with present circumstances and what constructions of the past are used to justify explanations of the present (Hatzimihail 2008).

Ralf Michaels argues that history plays such a prominent role not for empirical reasons but as a matter of faith, which cannot be falsified with evidence. (Michaels 2012). He also argues that the myth of the law merchant has a “rational counterpart,” like an idealisation or thought experiment used in philosophical argument, referring to the work of libertarian philosopher Robert Nozick. It is more an idea and not such much a depiction of a reality (Michaels 2012). Fassberg argues that “[f]or a long time, the existence of *lex mercatoria*, rather like the existence of God, seemed to depend

largely on the will to believe. Much early writing on the subject was characterised by an ideological, almost mystical zeal” (Fassberg 2004). In sum, it seems that what is at play in these arguments that rely on history are more rationalisation than a set of reasons or evidence-based explanations.

The debate between the romanticists and the skeptics about the historical law merchant, however, does not entirely undermine the proposition that multiple normative orders exist in commercial law. The debate has focused on whether in the medieval period and the Middle Ages a truly autonomous set of substantive norms not created by the state provided the rules for commercial transactions. The debate does not take away from the argument that there may be a plurality of norms, some in the form of official state law, others in the form of privately created rules, governing commerce today. In fact, this argument about the plurality of commercial norms seems to be supported by the historical evidence of merchant procedure, a limited role for local or trade-specific custom, and official protection of merchants and their dispute resolution processes. Moreover, side-lined in the debate is that merchant norms may influence official law.

II. A TAXONOMY OF MODERN COMMERCIAL LAW SOURCES

Before getting to theories about pluralism in commercial law, we need to get clear on the potential sources of commercial law. The significant plurality of sources makes commercial law an excellent case study of global legal pluralism in action in societies and the global economy. This significant plurality has led to several theories about whether there is a contemporary law merchant or transnational commercial law. The various views explored in the Part IV differ on which of these potential sources falls within the notion of a contemporary law merchant or a transnational commercial law. Part IV will also explore the treatment of merchant custom in contemporary commercial legislation.

There are at least twelve potential sources of commercial law. There are various ways to classify sources of commercial law. The list below is one way to classify the sources. (Linarelli 2009a)(Lando 1985). The literature does not reflect a settled view on the sources of commercial law. Moreover, longstanding confusion persists on how to classify sources.

A. Domestic Commercial Legislation and Codification

The American Uniform Commercial Code (UCC) is an example of domestic legislation. The American commercial law codification movement began in earnest in 1892 with the creation by the American Bar Association, at the urgings of the New York Legislature, of the then National Conference of Commissioners on Uniform State Laws (NCCUSL). Two waves of legislation in the United States culminated in the UCC, the first definitive version of which appeared first in 1957. It is state legislation, designed for each state legislature to promulgate. Despite some lack of momentum starting in the 1990s, the UCC has been successfully implemented across the United States, with the clearest success story being Article 9, governing secured transactions. It replaced earlier uniform legislation in the United States, enacted in the late nineteenth and early twentieth centuries.

England and Wales went through a codification movement in the nineteenth century, but unlike in the United States, which opted for a second wholesale reform through the UCC, many of the English commercial statutes from the nineteenth century, with some piecemeal modification, remain in force today. Countries in the civil law tradition have commercial codes. France enacted the Code de Commerce in 1807, redrafting it in 2000. The German Confederation enacted its first national commercial code in 1861. The German Empire subsequently enacted the *Handelsgesetzbuch* or HGB in 1897, which went into force in 1900. Some disagreement exists between common law and civil law traditions as to nature of codes and the scope of commercial law. These issues are beyond the scope of this chapter.

B. Domestic Court Decisions Augmenting Domestic Legislation or Codification

Domestic court decisions interpreting domestic commercial legislation or codes can be understood as a source of commercial law distinct from the legislation or code itself, to the extent that they add to the meaning of legislation in some way. We can avoid discussing debates about the role of statutory interpretation and yet still recognize this source of law. The line between additions to law and the interpretation of it, however, can be ambiguous. The homeward trend and now outward trend of judicial interpretations of the UN Convention on the International Sale of Goods

(CISG), for example, may be driving some pluralism in international sales law (Ferrari 2017).

These cases may or may not be decided within legal systems recognizing the concept of precedent or *stare decisis*. Still, in systems in which no concept of precedent or *stare decisis* exists, judicial decisions may be influential for other reasons having to do with ensuring consistency and uniformity in the law. There are distinctive aspects of normativity associated with court decisions that do not have to rely only on the concept of judicial precedent (Schauer 1987).

A classic example of this source of commercial law can be found in *US Fidelity & Guaranty Co. v. Federal Reserve Board of New York*, 620 F. Supp. 361 (S.D.N.Y. 1985), *aff'd per curiam*, 786 F.2d 77 (2d Cir. 1986). In this case, a depositor of a check in a US banking account committed fraud by altering the magnetic numbering of the check, causing the check to be sent to several banks and the Federal Reserve Bank of New York for collection even though drawn on a non-existent account. The US Federal District Court for the Southern District of New York found the depository bank to have engaged in clearly reckless conduct in allowing release of funds in the amount of the check, \$880,000. The court found the depository bank's conduct was "breathhtakingly foolhardy" and "commercially suicidal." The defendant banks asserted that an affirmative defense of comparative or contributory negligence should be applied. The UCC, however, is silent on the matter. As the court explained:

The primary difficulty with defendant's theory is that it is not expressly sanctioned by the UCC. Plaintiffs' suit is for violation of a duty imposed in the first instance by the UCC, and it is to that body of law which resort must first be had to determine the rights and liabilities of the parties. Although the UCC in some specific circumstances apportions liability on the basis of relative fault—most notably in the law of forged signatures and endorsements, . . . it incorporates no general rule of comparative or contributory negligence. In the area with which we are concerned, check collection, the Code imposes upon collecting banks a duty of due care and subjects them to "but for" liability for violations of the duty. . . . There is no express requirement that the plaintiff demonstrate its own due care as a prerequisite to recovery, nor is there any mention of comparative negligence. There is simply no mention of the effect, if any, of a plaintiff's negligence on its recovery . . .

The question cannot be permitted to end there, however. Article 4 of the Code, governing check collection, was developed in the 1950s, prior to the advent of large scale fraud upon the check collection

system. . . . The rules of liability which govern the allocation of losses arising from check transit were not—could not have been—designed with such fraud in mind. In these circumstances, to adhere blindly to the limitations imposed by those rules, if to do so would violate the policies which the UCC otherwise seeks to promote, would be unwise and unjust. Nor does the Code demand such adherence. . . . I do not, therefore, find the lack of a rule of contributory or comparative negligence in Article 4 to be an insuperable barrier to defendants' claim that such a rule should be imposed.

The Court went on to declare just such a rule, holding that a depository bank that is a victim of the sort of magnetic coding fraud found in this case may be unable to recover for breach of the due care standard by collecting banks if the collecting banks prove that the depository's bank's negligence played a role in the success of the fraud.

C. Case Law

In common law jurisdictions a substantial corpus of judicial precedent is a source of rules for commercial law. Commercial law rests in substantial part on contract law and rights in property (Goode & Mckendrick 2016). In jurisdictions in which the concept of judicial precedent does not apply, judicial decisions still may hold persuasive authority, as explained previously. Cases may be a subsidiary means of finding the law in jurisdictions that do not recognize the concept of precedent.

D. International Conventions

Treaties between states are an obvious source of commercial law. These treaties have a variety of labels. One such label is “international conventions” when they deal with transactional law, such as the Vienna Convention on the International Sale of Goods. In contrast, another label is “agreements” when they deal with the regulatory side of international trade, as in the free trade agreements, such as the World Trade Organization (WTO) agreements.

States have entered many multilateral and regional conventions governing a wide range of commercial activity, from the sale of goods to security interests in mobile equipment. Intergovernmental organizations such as the United Nations Commission on International Trade Law (UNCITRAL) and the International Institute for the Unification of Private Law (UNIDROIT) serve important functions in preparing model conventions. Despite criticisms, the conventions they produce are often

superior to the alternative of private international law approaches to handling legal problems that cross borders.

In the United States and many other countries, most and perhaps even all commercial law conventions are, to use an American term, self-executing, which means that they become law once ratified by the national legislature, without the need for domestic implementing legislation. The distinction is significant. From the standpoint of understanding the pluralism in commercial law, a commercial law convention that is self-executing, once ratified, becomes part of domestic law. In the American federal system, a self-executing convention has the same authority as a federal statute and can even preempt state law, such as the UCC (Linarelli 2009a).

E. Model Laws and Guides

Commercial law conventions should be distinguished from other products of intergovernmental organizations such as UNCITRAL and UNIDROIT: model laws and legislative guides. These instruments are standard setters for commercial law. A model law is not a formal agreement between countries in the form of a convention. Nor is it a legislative guide. They both require, however, substantive agreement as to content; otherwise they would not be approved in the relevant rulemaking process. A model law is something for municipal legislatures to consider for enactment as municipal legislation, and a legislative guide is just that—a guide for municipal legislatures to use in drafting their own legislation. Ministries responsible for participating in international lawmaking for their governments often prefer model laws and legislative guides because these documents do not have to go through ratification processes and there is no worry about entry into force as a source of international law. Many model laws and legislative guides produced today are produced for consideration by developing countries in need of improving their legal institutions.

F. Domestic Court Decisions on International Conventions

Commercial law conventions are subject to interpretation just like domestic codes. The same concepts identified in section B above apply *mutatis mutandis* here. It is by now well accepted that uniformity in the law is not achieved simply by promulgating a code or convention. Courts interpret conventions to decide cases, and interpretation in different state traditions has the potential to bring about divergences in

interpretation. Divergence can occur even in the municipal courts of a single state. The text of an international convention itself may inform on how to deal with gaps in the convention. Suffice to say for our purposes here that judicial decisions on commercial conventions may produce a set of distinctive norms to govern commerce (Linarelli 2009a).

A significant jurisprudence exists, for example, on the UN Convention on the International Sale of Goods. UNCITRAL maintains a searchable database known as Case Law on UNCITRAL Texts (CLOUT), which collects court decisions and arbitral awards relevant to all UNCITRAL conventions as well as model laws http://www.uncitral.org/uncitral/en/case_law.html.

G. *Trade Usages*

The American UCC Section 1-303(c) defines a “usage of trade” as “any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question.” Comment 3 accompanying the original drafting of the UCC explains that trade usages are meant to assist in understanding the meaning of contract terms and to supplement contract terms but that the Code “expresses its intent to reject those cases which see evidence of ‘custom’ as representing an effort to displace or negate ‘established rules of law’.” CISG Article 9(2) provides that the “parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.” Other countries maintain various concepts in their legal systems (Dalhuisen 2013)(De Ly 1992). The UNIDROIT Principles of International Commercial Contracts (2016) provides that contract parties “are bound by any usage to which they have agreed and by any practices which they have established between themselves” and “a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable.”

A possible distinction between English and American law may be found in whether a sense of legal obligation is necessary for a trade usage to come into

existence. Goode and Toth argue that English law requires some sense of obligation similar to what is required by the *opinio juris* requirement for the recognition of custom as a source of public international law (Goode 1997)(Toth 2017). Goode and Bederman appear to agree that the sense of obligation requirement is not generally required by American courts or in the UCC or CISG. (Bederman 2010)(Goode 1997). This distinction seems debatable as UCC Section 1-202(c) does speak to a justified expectation. Many of these norms have such universally accepted status that they reflect a normative practice independent of national law, though supplementing the law of the contract and not derogating from mandatory state law. If you ask a banker if they comply with the Uniform Customs and Practices for Documentary Credits (UCP) for example, the answer will very likely be “yes,” and not qualified by “only when incorporated into a contract” (Linarelli 2009a). Bederman identifies “a strong pull of behavioral expectations in the communities that create and follow them” (Bederman 2010).

Trade usages can be classified in terms of how they arise. Some may evolve as custom. Others are privately legislated. The distinction might be understood with the terms “codified” versus “uncodified” (Goode & McKendrick 2016)(Goode 1997)(Lando 1985). In either case, the formulation of trade usages might be seen as an example of “bottom up” law making by merchants and professionals as opposed to “top down” law making by states and intergovernmental organizations (Levit 2008a)(Levit 2008b)(Levit 2005).

By privately legislative norms I mean to refer to sets of rules of a legislative or regulatory character, promulgated by non-state actors such as the International Chamber of Commerce (ICC) in a legislative or regulatory setting. They are intended to be codifications of customary practices. They can include but are not limited to standard form contracts. They can be transnational or domestic. INCOTERMS and the UCP, both ICC products, are examples. Other ICC products are the Uniform Rules for Demand Guarantees and the Uniform Rules for Contract Bonds (Goode & McKendrick 2016).

Some may question whether privately legislated norms, or really any form of trade usage, are sources of law. They would, rather, say that they are standard contract terms and conditions that become part of the law of the contract when they are impliedly or explicitly incorporated into a contract, or serving as contractual gap

fillers, and are then governed by whatever national law applies to the contract, including conventions that the country whose law applied has adopted. Whether trade usages are entirely independent of official state law seems to be a side issue when one considers how these norms interact with official state law, sometimes even by design of state organs (Linarelli 2009a). For example, INCOTERMS are standard terms and conditions for allocating delivery obligations between buyers and sellers in sale of goods contracts that cross international borders. The “official” laws of nations have been notoriously deficient and lacking in uniformity on the issues that INCOTERMS covers. In substance, states may be outsourcing the function of producing law to merchants.

H. *Use of Trade Usages by Courts and Arbitral Tribunals*

Courts and arbitral tribunals have frequently applied trade usages. In *Harlow and Jones Ltd. v. American Express Bank Ltd.*, 2 Lloyd’s Rep. 343 (QBD 2000), the Queen’s Bench held that the UCP governs banking relationships even if not expressly incorporated by contract. A classic example of uncodified trade usages in action is in the American case of *Kungling Jarnvagsstyrelsen v. Dexter & Carpenter*, in which a Swedish buyer bought coal from an American seller, paying on acceptance of documents in a c.i.f. contract, which included a certificate of marine insurance. The shipment was lost at sea and it turned out there was no insurance. The buyer argued that supplying only an insurance certificate and not an insurance policy failed to comply with the requirements for a c.i.f. contract. Judge Learned Hand rejected the application of the holding of an English case on point, finding that settled commercial usage provides that an insurance certificate was sufficient. Hand explained, “much as I should hesitate to diverge from the settled law of so great a commercial country:”

When a usage of this kind has become uniform in an actively commercial community, that should be warrant enough for supposing that it answers the needs of those who are dealing upon the faith of it. I cannot see why judges should not hold men to understandings which are the tacit presupposition on which they deal. From Lord Holt’s time on they have generally in one way or the other been forced in the end to yield to the more flexible practices of commercial usage. So far as I know, the results have been generally acceptable to everyone, once they were settled.

Similar more recent cases exist, though the case law is inconsistent in both England and the United States (Bederman 2010).

UNCITRAL Arbitration Rules at Article 35.3 provides that “[i]n all cases, the arbitral tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction.” The rules of other arbitral institutions are similar. Arbitrators have done so even absent incorporation into the contract (Bederman 2010)(Berman & Dasser 1998). Trade usages are extensively relied upon in international commercial arbitration to complement state law, fill gaps in contracts, and even to avoid national law inconsistent with settled transnational commercial practice (Sweet & Grisel 2017).

Avoided here is an argument about “incorporation” of trade usages into law through common law adjudication. As explained in Part I, the incorporation story is contested.

I. *Quasi Legislative Principles*

Legal comparativists have engaged in numerous projects to produce transnational restatements of principles of contract law. These projects can be traced back to efforts before the First World War to produce a French-Italian Law of Obligations (Berger 1999). The Principles of European Contract Law (PECL), produced by the Commission on European Contract Law established by Ole Lando, fall into this category, as does the proposed European Civil Code and the Draft Common Frame of Reference for a European Private Law (von Bar et al, 2009).

An influential set of principles relevant to cross-border contracts are the UNIDROIT Principles of International Commercial Contracts. It is a contract code of sorts, prepared by a group of country representatives and observers in a working group under the authority of UNIDROIT (Bonell 2009). UNIDROIT has substantial government representation but the Principles are not a convention. One of their intended purposes is to serve as a “model for national and international legislators.” They are a substantial source of principles of contract law. Their Preamble is ambitious in specifying that they “may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria*, or the like,” or when the parties have failed to include a choice of law clause in their contract, or “interpret or supplement” either domestic law or to “uniform law instruments.”

The American Restatements of law relevant to commerce, such as the Restatements on Agency, Contracts, and Restitution, can be said to come within this category. The American Restatements are produced by the American Law Institute, a non-profit organization established in the early twentieth century to clarify, modernize and improve US law, with an emphasis on American common law.

Some scholars have raised concerns about the efficacy and authority of the UNIDROIT principles. According to Jan Dalhuisen:

They are no more than products of a UNIDROIT committee and as such have at best persuasive power in terms of a restatement or as soft law. Their authority is hardly in their academic pedigree and content, and their legitimacy if any can only derive from their reflection of international fundamental principles or from the ability of the international legal practice to recognise itself in them and to accept their guidance. . . . To put it more crudely, short of them reflecting fundamental legal principle and mandatory international practice, only the market place can decide their ultimate fate. Ordinarily therefore, international trade and commerce have themselves here the last word (Dalhuisen 2013).

The need for proof of their success in actual use is an uncontroversial point. Michael Joachim Bonell, the Chairperson of the Working Group that drafted the Principles, has stated that “it can hardly be disputed that, . . . with respect to the UNIDROIT Principles, what really matters is . . . whether, and the extent to which, they may be applied in practice in lieu of or in addition to domestic law” (Bonell 2009).

Empirical work on these questions is limited. Between 2007 and 2011, parties did not specify choice of law in fifteen percent of new cases brought before ICC arbitration (Sweet & Grisel 2017). Conceivably this could result in the application of choice of law principles based on the nationality of the parties, but it could also result in the application of the UNIDROIT Principles or what might be characterized as a contemporary law merchant, as discussed in Part IV below.

J. *Arbitral Awards*

Arbitral awards could be said to have developed as a form of precedent over the years. This conclusion is perhaps more the case for ever-increasingly judicialized institutional arbitration such as before the International Chamber of Commerce and the International Centre for the Settlement of Investment Disputes, prominent locales for commercial and investment arbitration respectively.

In its early years, the International Chamber of Commerce resisted moves towards the notion that their arbitral awards could serve as precedent by prohibiting publication of awards, enforcing confidentiality, not requiring awards to give reasons for decisions, and favoring “equitable” approaches to arbitral adjudication. These restrictions eventually loosened, particularly as parties to arbitrations clamored for more predictability and consistency in awards (Sweet & Grisel 2017).

Debate persists as to the normative force of arbitral awards in international commercial arbitration. In an influential article, Lord Mustill argued that at most awards form a “micro *lex mercatoria*,” in which a law is “newly minted by the arbitrator on each occasion, with every contract the subject of its own individual proper law” (Mustill 1987)(Sweet & Grisel 2017). As explained in Part IV below, Lord Mustill was a strong critic of the idea of a contemporary law merchant. There is however, a reasonable argument to be made that arbitral awards in international commercial arbitration comprise a form of soft precedent short of *stare decisis*. As Sweet and Grisel explain, a “good” arbitrator produces a defensible award “on the basis of usages, general principles, and specific doctrines, that she knows other arbitrators will also curate as precedent.” They continue: “[t]hese doctrines, principles, and rules comprise a foundational common law that grounds arbitral decision-making – including the underlying bases of the tribunal’s decision-making authority – enabling arbitrators to control the proceedings and fashion outcomes in light of separate streams of legal norms flowing from multiple sources.” These they conclude are “best practice” standards for arbitrators. ICC tribunals have declared as much. (Sweet & Grisel 2017).

In investor-state arbitration, the rules on publication of awards gradually moved towards publication over the years. Today, almost no one in the field denies the notion of arbitral precedent in investor state arbitration, though disagreement persists on what the notion of precedent precisely entails for investor-state arbitration. Despite institutional obstacles, parties plead and argue based on prior arbitral awards and International Center for the Settlement of Investment Disputes (ICSID) panels and other arbitral tribunals use prior awards in their decisions (Sweet & Grisel 2017). These beliefs and attitudes may be inconsistent with relevant formal law, which would be public international law in the case of investor-state arbitration. Article 38(1)(d) on the sources of international law states that *judicial* but not arbitral

decisions are a “subsidiary means for the determination of rules of law” as are “teachings of the most highly qualified publicists of the various nations.” Though a reasoned arbitral award might not technically qualify as a judicial decision, its authors in some cases will be “most highly qualified publicists” and so it will be difficult to escape the normative pull of these decisions. Moreover, arbitral awards in investor-state arbitration may offer evidence of “general principles of law recognized by civilized nations,” which constitute a formal source of public international law under Article 38(1)(c) of the Statute of the International Court of Justice. We will now turn to general principles of law as a potential source of law for commercial and investment contexts.

K. General Principles of Law

Charles Kotuby summarizes the concept of general principles of law as they are used in arbitration as follows:

For over a century international judges have observed that there are certain minimum, corrective principles inherent in every legal system. These “general principles of law recognized by civilized nations” derive from the consensus of municipal legal systems in foro domestic, and while they are grounded in the positive law of nation states, they rest alongside custom and treaties as a primary source of international law. They seek to define the fundamentals of substantive justice and procedural fairness, and have been applied by the International Court of Justice, international investment tribunals, and commercial arbitration panels time and again to reach judicious results when the applicable law otherwise would not (Kotuby 2013).

For detailed analytical treatments of the place of general principles in public international law and hence in investor-state arbitration, *see* (Kotuby & Sirota 2017)(Cheng 1953).

Significant disagreement and confusion persist in understanding what might constitute a general principle of law in international commercial and investment arbitration. We can divide the disagreements into two categories: analytical, going to what precisely are general principles of law, and the normative and critical, going to how arbitrators might be deploying general principles to thwart national policies of the state in investor-state arbitration.

The analytical claim ultimately rests on concern about the proper law to be applied in an arbitration and indeed what “law” as a concept precisely entails. In the natural law tradition, general principles can be understood as a product of “right

reason,” which would make them distinguishable from rules based in social practices such as based on widespread acceptance. Justification of general principles often rely on a mix of natural law-type and social practices-type reasons. Article 38(1) of the ICJ statute is silent on these points.

Several analytical concerns about general principles of law have been or can be made. A few of these are set forth here. The principles are “general” and some concern has been expressed that this could lead to uncertainty and unpredictability (Mustill 1987)(Gaillard 2010). Some have argued that they are formal and empty and give arbitrators wide discretion to do what they want. A positivist-based concern is that they are not created or recognized by a valid legal authority and themselves are invalid. There is an epistemological concern about how a lawyer or arbitrator can ever know these principles. Finally, some confusion seems evident in not clearly distinguishing general principles from custom or trade usages.

The normative concerns about general principles of law usually center on the use of general principles of law instead of national law. International arbitrators view their authority to identify and apply local law as “plenary,” from which they have concluded that they can refuse to apply, in Jan Paulsson’s phrase, “unlawful laws” (Paulsson 2008)(Kotuby 2013). A strategy that arbitrators have deployed to sidestep denying the authority of domestic law is to effectively nullify domestic law with an “corrective norm” in the form of a general principle of law (Kotuby 2013). The ICSID panel in *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Application of Annulment (Feb. 5, 2002) declared that general principles “prevail over domestic rules that might be incompatible with them and that general principles can be applied to correct or replace domestic law that is in conflict with “minimum international standards” (Kotuby 2013). There are arbitral decisions on both sides of this issue. It seems clear, however, that in such cases, an arbitral panel effectively sits as a constitutional court with the power of judicial review of the domestic law, with international law effectively serving as a form of constitutional law. While cases exist in which such denial of the authority of domestic law might seem appropriate from the standpoint of justice, as in clear cases of dictators coming to power and passing edicts to expropriate foreign investment, one can readily see how these cases can also be understood as a form of hegemony by arbitrators with allegiances to from powerful capital exporting states, thwarting nation-state

sovereignty to take a particular path towards development that powerful states might disfavor (Linarelli, Salomon, & Sornarajah 2018). The phrase “civilized nations,” used in Article 38(1)(c) of the ICJ Statute, has a dubious legacy, originating in nineteenth century approaches to international law which used the phrase to refer only to European states (Orakhelashvili 2006).

L. *Commercial Custom Not Elsewhere Classified*

Is there any custom beyond trade usages and custom not characterized as a general principle of law? There would seem to be a different category of norms we are leaving out here, that are (i) not trade usages and (ii) customary and (iii) not based in reason, natural justice, or in widespread usage in legal traditions across the world. These could be customary rules used in commerce. A distinction exists between a general principle of law and a customary rule, recognized in public international law in Article 38(1)(d) of the Statute of the International Court of Justice. There may be customary rules of commercial that do not relate to any particular trade or industry, or which do not clearly fit within the definition of a trade usage.

The American UCC Section 1-103(a) provides that the UCC “must be liberally construed and applied to promote its underlying purposes and policies, which are . . . to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties.” Furthermore, Section 1-103(b) provides that “[u]nless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity, including the law merchant . . . supplement its provisions.” The UCC official commentary advises that the list of sources in Section 1-103(b) is not exclusive and “[n]o listing could be exhaustive.” UCC section 1-303 distinguishes trade usages from course of dealing and course of performance, a distinction also recognized in CISG article 9(2). Course of dealing and course of performance seem more like Lord Mustill’s mini *lex mercatoria*. Dalhuisen explains that these UCC concepts are intended mainly for sale of goods contracts (Dalhuisen 2008).

Views on the existence and role of custom in commercial contexts run the gamut. Dalhuisen, for example, has argued that much of custom has a mandatory character: if you are a merchant or professional to whom it applies, then you have no choice but to comply with it (Dalhuisen 2013)(Dalhuisen 2008). He argues that “the transnational

sources of private law were never completely extinguished in commerce and finance, and continued to contribute to the infrastructure for the international marketplace” (Dalhuisen 2013). He has attempted to identify areas of law in which custom prevails (Dalhuisen 2008). It is unclear, however, whether his definition goes beyond trade usages.

One approach to identifying custom is in Berger’s creeping codification project: the constant updating of a list of norms, which can be found at [https://www.trans-lex.org/principles/of-transnational-law-\(lex-mercatoria\)](https://www.trans-lex.org/principles/of-transnational-law-(lex-mercatoria)) (Berger 1999). But these rules do not seem to do too much to identify commercial custom as much as they do a finer-grained set of general principles of law. This project may be more a competitor to UNIDROIT and the legal principles produced by quasi-legislatures than a project about identification of custom.

III. PLURALISM IN OFFICIAL STATE COMMERCIAL CODES AND LEGISLATION

A widely held view is that in the nineteenth century, states took over the job of producing commercial law. Legal scholars have constructed a narrative about this event as one of “nationalization” of commercial law from its prior *lex mercatoria* roots, which included passage of official state legislation, codification, and the “incorporation” of the law merchant into official state law, which then terminated or made invisible the law merchant (Goldman 1983)(Medwig 1993). As explained in Part I, the historical law merchant story is largely false. The nationalisation story, moreover, is an over-simplification. The nationalization claim presupposes the existence of a modern nation state frozen in time. It is more likely that commercial law evolved with the nature of the state, the changing structure of economies, and industrialization. A constant feature of commercial law is its adaptation to commerce and technology. The move towards legislation and codes is likely the result of a number of contributing factors, including the rise of the global economy, the need for modern states to reduce transaction costs in large common markets in industrialised societies, the rise of new forms of commercial law, such as the law on secured transactions, which is mainly a form of property law requiring state action in the form of registration of security interests, and a change in the way lawyers understood the law, with an increasing emphasis on legal positivism and away from the prior hierarchy of sources identified in Part I. Positive law is no longer at the bottom of the

heap as it was in the era of principalities, city-states, and kingdoms, but at the top in states in which laws were increasingly the product of democratically elected legislatures.

This Part covers a transition in thinking about pluralism in commercial law in the nineteenth century and early twentieth century, as commercial legislation and codification became ascendant. It will examine how nineteenth century views on commercial law pluralism transitioned into twentieth century views. The simplistic version of the story is that the nineteenth century codifiers were hostile to custom while the signal achievement of twentieth century commercial codification, the American UCC was very friendly to it. While the latter part of the story about the American UCC is largely true the former part about the nineteenth century is only partly true.

A. *Pluralism in Nineteenth Century Commercial Codes and Legislation*

The usual story about the nineteenth century is that it is an era of positivism hostile to pluralism. John Austin's argument against custom as a source of law in *The Province of Jurisprudence Determined*:

By many of the admirers of customary laws (and, especially, of their German admirers), they are thought to oblige legally (independently of the sovereign or state), because the citizens or subjects have observed or kept them. Agreeably to this opinion, although the sovereign or state may abolish them at pleasure. Agreeably to this opinion, they are positive law (or law, strictly so called), inasmuch as they are enforced by the courts of justice: But, that notwithstanding, they exist as positive law by the spontaneous adoption of the governed, and not by position or establishment on the part of political superiors. Consequently, customary laws, considered as positive law, are not commands. And, consequently, customary laws, considered as positive law, are not laws or rules, properly so called. An opinion less mysterious, but somewhat allied to this, is not uncommonly held by the adverse party: by the party which is strongly opposed to customary law; and to all law made judicially, or in the way of judicial legislation. According to the latter opinion, all judge-made law, or all judge-made law established by subject judges, is purely the creature of the judges by whom it is established immediately. To impute it to the sovereign legislature, or to suppose that it speaks the will of the sovereign legislature, is one of the foolish or knavish fictions with which lawyers, in every age and nation, have perplexed and darkened the simplest and clearest truths. I think it will appear, on a moment's reflexion, that each of these opinions is groundless: that customary law is imperative, in the proper signification of the term; and that all judge-

made law is the creature of the sovereign or state. At its origin, a custom is a rule of conduct which the governed observe spontaneously, or not in pursuance of a law set by a political superior. The custom is transmuted into positive law, when it is adopted as such by the courts of justice, and when the judicial decisions fashioned upon it are enforced by the power of the state. But before it is adopted by the courts, and clothed with the legal sanction, it is merely a rule of positive morality: a rule generally observed by the citizens or subjects; but deriving the only force, which it can be said to possess, from the general disapprobation falling on those who transgress it (Austin 1832).

What is often absent from the discussion of this famous quote from Austin was that he was partly responding to German jurists like Savigny and Goldschmidt who argued that the law can only be understood through the study of its history. The German historicists rejected natural law and the Enlightenment ideal that universal and eternally valid legal principles can be discovered as product of reason. They looked to historical evolution, which they associated with the *Volkgeist* – a national spirit or common consciousness of the people. Law in this sense is custom. Accessing the *Volkgeist* required the systematic study of customary practices of the people, which required a study of what was seen as European common law, with some such as Savigny seeing its origins in Roman law while others in the customs of medieval Germany. Historical jurisprudence also had its advocates in England and the United States (Rabban 2013). While historical jurisprudence rests on a number of mistakes, its influence in the nineteenth century was significant. As stated by Rabban, “[h]istorical explanation dominated nineteenth century intellectual life throughout the Western world (Rabban 2013). He echoes Roscoe Pound’s declaration of the nineteenth century as a “century of history” (Pound 1922). Austin was not influential in Europe and was influential in England only posthumously (Rumble 1985). While there were rationalists in Germany and the beginnings of analytical jurisprudence in England go back to Hobbes, there was no clear dominance of positivism among lawyers and jurists in the nineteenth century. The history of legal thought can be understood not so much as a move to positivism but more a move to fill a Post-Enlightenment void in an emerging age of industrialisation and the rise of national economies operating on the global stage.

Contrary to popular folklore, nineteenth century civil and commercial law was not hostile to custom, nor were the codes of other European countries (De Ly 1992). The first German Commercial Code of 1861, whose primary drafter was Goldschmidt,

sought to reflect the “immanent law” of Germany in its contents (Whitman 1987). The American Uniform Sales Act of 1906 was friendly to trade usages, course of dealing, and custom more generally. Section 71 of the Uniform Sales Act provides:

Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negated or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale.

Similarly, the English Sale of Goods Act 1893 at section 61(2) provides:

The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, shall continue to apply to contracts for the sale of goods.

To conclude, moves toward codification and in the development of the modern state did not purge pluralism from commercial law in the nineteenth century. Conceptions of pluralism were recharacterized to be consistent with the prevalent conceptions of law and jurisprudence of the time.

B. Embracing Pluralism in the American Uniform Commercial Code: The Incorporation Strategy

The second wave of commercial law codification can be said to have had its start in the post-War period in the development of the American Uniform Commercial Code. William Twining, in his definitive biography of Code architect Karl Llewellyn, states: “[t]he Uniform Commercial Code is the product of one of the most ambitious legislative ventures of modern times” (Twining 2012).

Karl Llewellyn, one of the most prominent American legal realists and legal scholars of his generation, constructed one of the most important operating principles for the UCC to be that the Code should reflect and be open to applying, and courts should seek to use in commercial disputes, “immanent business norms” (Bernstein 1996). Bernstein has characterized this fundamental operating principle for the Code as its “incorporation strategy” (Bernstein 1996). UCC section 1-103 mentions the law merchant as a source of law. UCC 1-301 comment 3 provides that “[a]pplication of the Code . . . may be justified . . . by the fact that it is in large part a reformulation and restatement of the law merchant and the understanding of the business community which transcends state and even national boundaries.” Lisa Bernstein has pointed out

that “most importantly” immanent business norms constitute “the basis of the Code's definition of agreement” in UCC section 1-201(3), which includes “the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance.” The Article 2 (sale of goods) Permanent Editorial Board has stated that “reducing the gap between law and practice . . . in the relevant business community” is a Code primary objective (Bernstein 1996).

In sum, the basic underlying philosophy of the UCC leads to pluralistic set of norms governing commerce in whatever commercial situations to which the Code applies. Law and economics scholars have fiercely criticized this “incorporation strategy,” as we discover in Part V below.

IV. A CONTEMPORARY LAW MERCHANT?

In the 1980s there began a significant and still largely unresolved disagreement about (1) whether a contemporary law merchant exists, (2) if so, what comprises it, and (3) whether it constitutes an autonomous legal order distinct from state legal orders. The contours of this disagreement form mainly around a competition among mostly international commercial and investment arbitrators from different national traditions. Generally, and not without counter-examples and nuanced positions, common law lawyers in the Anglo-American tradition tend to argue that no contemporary law merchant exists and that the positive law of states solely or at least principally governs transnational commerce. On the other side of the debate are mainly continental and French lawyers who argue that a contemporary law merchant indeed does exist as a de-territorialised set of principles to be applied to resolve disputes (Dezalay & Garth 1996). The debates tend to fudge the question about the existence of an autonomous legal order though some advocates do take that stance. Some take a middle-ground and suggest a modest and supplementary form of contemporary law merchant. Still others include all the sources of commercial law outlined above into a concept often referred to as transnational commercial law. As Roy Goode has explained, “[u]nfortunately, there is no agreement on what the *lex mercatoria* comprises” (Goode 2005).

A. *Mercatorists, Statists, and Pragmatists*

A longstanding debate remains unresolved between two camps on whether there exists a contemporary law merchant or *lex mercatoria* that just might be the ancestor to the historical version of the law merchant that existed in medieval times and in the Middle Ages. The two camps have been classified as “mercatorists” versus statistes (Kadens 2012)(Hatzimihail 2008).

In a lecture in 1983 entitled “Lex mercatoria,” Berthold Goldman offered what has become probably the most influential argument for the existence of a contemporary law merchant (Goldman 1983). Goldman defines his view of the contemporary law merchant to be the narrow view, consisting of “a set of general principles and customary rules spontaneously referred to or elaborated on in the framework of international trade, without reference to a particular national system of law” (Goldman 1983). Goldman contends that one cannot define the law merchant by the “object of its constituent sources,” but rather, one must also look to its origin, which he says is in its customary and spontaneous nature. He also requires frequent use. Goldman says that standard form contracts are not law merchant unless they achieve the status of custom by frequent use (Goldman 1983). Goldman argued that this contemporary law merchant is a descendant of the historical law merchant, a body of law put into “hibernation” through nineteenth century unification and codification efforts, only to be revived in the twentieth century. In Goldman’s view, it is an autonomous, de-territorialized legal order whose rules do not depend on the state for their existence and validity.

Goldman distinguished a narrow versus a wide view of the law merchant with his view being the narrow view. The wide view is that of Ole Lando, Clive Schmitthoff, and others, in which the law merchant includes law from official government sources, as well as from trade and professional sources, mainly as outlined in the above Part II (Lando 1985)(Schmitthoff 1981)(Michaels 2007). Schmitthoff’s view of the *lex mercatoria* accords more comfortably with the views of the traditional lawyer in the common law tradition. He emphasized the *lex mercatoria* as a project of codification, with little by way of spontaneous creation. His view was robustly state centered. To Schmitthoff, the universality and autonomy of the *lex mercatoria* derives “by leave and license of all national sovereigns” (Schmitthoff 1981).

Statists, mainly but not exclusively English common law lawyers who are arbitrators, deny the existence of the law merchant. The main protagonists on the statist side of the debate were Lord Mustill and FA Mann (Mustill 1987)(Mann 1984)(Mann 1967) but there are others, including Paul Lagarde, who argues that a contemporary law merchant is conceptually impossible (Lagarde 1982). Giles Cuniberti employs economic analysis to argue that the contemporary law merchant is inadequate because it fails to provide parties with clear and precise default rules (Cuniberti 2014). Statists tend to be practitioners in large Anglo-American law firms located primarily in European capitals (Garth & Dezalay 1996), who promote English or New York law as the preferred choice of law for transnational commercial disputes. They tend to see the law merchant as a way for "academics to avoid the rigorous analysis of the facts, the formal law, and even the terms of the contract" (Garth & Dezalay 1996). One of Garth's and Dezalay's interviews for their book, *Dealing in Virtue*, was of a "well-known English QC from the commercial bar," who said: "These people are just deciding by the seat of their pants. There's no such thing as the *lex mercatoria*" (Garth & Dezalay 1996). Lord Mustill, who was a British Law Lord and an accomplished international commercial arbitrator, asked:

What is the jurisprudential basis of the *lex*? It is remarkable that given the volume of academic writing on the topic—a volume which considerably exceeds that of the [arbitral] awards which purport to put the doctrine into practice—there is even now no consensus on the intellectual basis of the doctrine. Is the *lex* a law, properly so called, or is it a body of rules which the parties choose (expressly or impliedly) to apply to their individual contract? If it is a law, from where does it draw its normative force? (Mustill 1987)

As Lord Diplock said in *Amin Rasheed Shipping Corp. v. Kuwait Insurance Co.*, [1984] A.C. 50, 60 (H.L. 1983):

The purpose of entering into a contract being to create legal rights and obligations between the parties to it, interpretation of the contract involves determining what are the legal rights and obligations to which the words use in it give rise. This is not possible except by reference to the system of law by which the legal consequences that follow from the use of those words is to be ascertained.

Lord Diplock also said in that case:

Contracts are incapable of existing in a legal vacuum. They are mere pieces of paper devoid of all legal effect unless they were made by reference to some system of private law which the obligations assumed by the parties to the contract by their use of particular forms of words

and prescribes the remedies enforceable in a court of justice for failure to perform any of those obligations.

FA Mann has said:

It is difficult to imagine a more dangerous, more undesirable and more ill-founded view which denies any measure of predictability and certainty and confers upon the parties to any international commercial contract or their arbitrators that no system of law permits and no court could exercise (Mann 1984).

In an influential counterargument to the statist position, Emmanuel Gaillard, holding a view sympathetic to Goldman's, builds on the idea that the contemporary law merchant is a method of decision-making and not a list of principles (Gaillard 2010)(Gaillard 2001)(Gaillard 1995). He argues that "[e]very question, no matter how specific, can . . . be resolved using this method, which consists of giving precedence to the generally accepted solution over that reflecting a more idiosyncratic view" (Gaillard 2010). What he calls the "transnational rules method" allows for the development of both mandatory and default rules and "truly international public policy rules, which correspond to the public international law concept of *jus cogens* (Gaillard 2010). According to Gaillard, "general principles are general because widely accepted, not because they lack specificity" (Gaillard 2010). They follow the dictates of legal reasoning in what Gaillard calls "principle-exception logic" (Gaillard 2010).

Of course, private international lawyers might object to the notion of a contemporary law merchant. Frederich Juenger laments that supranational law in the form of a law merchant undermines the positivist and statist foundations on which private international law doctrines rest. With a reference to Oliver Wendall Holmes Jr.'s famous aphorism, "[s]uch a law is inexplicable in their terms of reference; its 'brooding omnipresence' must be anathema to those who believe that the *raison d'etat* must control international as well as purely domestic transactions" (Juenger 1995). Juenger continues: "Worse yet, the *lex mercatoria* threatens the very existence of the conflict of laws because once supranational norms emerge, choice-of-law rules and principles become superfluous. In addition, the new law merchant poses a challenge by virtue of its qualitative superiority" (Juenger 1995).

Juenger's distinction between conflicts and *lex mercatoria* approaches can profitably be compared to Klaus Peter Berger's explanation of the nature and authority of the law merchant. Berger argues that "[t]he states' loss of their formerly dominant position in international policy and rule-making which goes along with this

process, the decreased significance of sovereignty and the freedom of the parties in international contract law” have prompted a reconsideration of narrow positivist views of the law and its sources (Berger 2001). Berger continues:

Since the law has to take account of the complexities of society, it is not the public reason represented by the state or by inter-governmental organizations *alone* but also the power for self-regulation and coordination of the individual and of private organizations and federations which justifies normative force. The traditional theory of legal sources which was centered around the notion of sovereignty is being replaced by a legal pluralism which accepts that society's ability for self-organization and coordination is more than a mere factual pattern without independent legal significance. Today, it assumes a normative quality of its own (Berger 2001).

This chapter offers a three-fold classification of positions about the existence and concept of of a contemporary law merchant along mercatorist, statist, and pragmatist lines. The classification of pragmatists is an uneasy one because it is difficult to cabin what it precisely means to say one is taking a pragmatic view about the law merchant. The focus here will be on the approach of Andreas Lowenfeld, who identified the category of thinking about the *lex mercatoria*, though others may also be classified as in the pragmatist camp, including L. Yves Fortier and Jan Dalhuisen (Dalhuisen 2015)(Dalhuisen 2013)(Dalhuisen 2008)(Dalhuisen 2006)(Fortier 2001). Lowenfeld seems to agree with the mercatorists:

Together with Goldman, Lando, and most of its other proponents, I do not view *lex mercatoria* as some arcane mystery, open only to anointed guardians of an ambiguous flame. It is perfectly appropriate, in my view, for counsel to submit argument to the tribunal about the content of the *lex mercatoria*, as well as about the usages of the particular trade and the circumstances on which the parties had, or fairly could have, relied. In fact, in my experience, counsel nearly always so present such evidence and argument, in one guise or another. I do not recall anyone arguing, in a commercial case, “The result we seek is plainly unfair, but it’s just too bad, that’s the law” (Lowenfeld 1990).

But Lowenfeld does not go as far as the mercatorists. He further explains that it is common practice for an arbitrator not to reject any national law as the governing law and he never sat on a panel at the time of his writing in which the parties had specified the *lex mercatoria* as the governing law. According to Lowenfeld, the *lex mercatoria* is not some autonomous legal order. It is “not a self-contained system covering all aspects of international commercial law to the exclusion of national law” (Lowenfeld 1990). The gist of his argument was that sometimes specific rules of domestic law are not suitable for international transactions. Lowenfeld argued that the *lex mercatoria* is

an alternative to a conflict of laws analysis, which can be “artificial and inconclusive” and “a way out of applying rules that are inconsistent with the needs and usages of international commerce and that were adopted by individual states with internal, not international, transactions in mind” (Lowenfeld 1990).

Dalhuisen offers a hybrid theory that is difficult to classify along strict mercatorist versus statist lines, though he clearly could be said to be more closely in the mercatorist camp. Unlike Lowenfeld, he argues that a “non-territorial non-statist legal order” operating in international trade and finance “as a natural consequence of the globalization of the international professional activities in these areas, and the freeing of the flows of persons, goods, services, capital and technology internationally. . . (Dalhuisen 2013). This legal order, according to Dalhuisen, “now has the capacity and energy to move itself forward, creating its own laws and even law-making institutions or facilities . . . (Dalhuisen 2013). He explicates a hierarchy of the norms, which suggest he is not entirely misaligned with Schmitthoff’s wide view. His variation on general principles of law are “fundamental” principles of law, which are like lists offered by others, including by Lord Mustill (Dalhuisen 2013).

There seems to be a political economy argument to some of the positions taken, which would look for answers to why various positions are taken not in the substance of the argument but in the interests of the persons making the arguments. As Garth and Dezalay explain:

[E]ach side seeks to promote the value of the know-how or the competence that it has mastered the best. Academics-with a competitive advantage in theory-emphasize the *lex mercatoria* elaborated in countless academic books and articles. Practitioners promote the virtues of solid case law and thorough analysis of the facts (Garth & Dezalay 1996).

The discussion seems to also relate to judicial control. Arbitrators qualified in England and Wales, for example, many of whom are retired judges or are QCs, usually fall in the statist camp and would prefer having an English court engage in supervision (Lowenfeld 1990)(Mann 1967). This in a sense is not much different from forum shopping as that term is applied to the distributed federal structure of courts in the United States.

Using a theory on the economics of information asymmetries, Christopher Drahozal argues that positions taken on the existence of a contemporary law merchant

constitute signalling by prospective arbitrators in a market for arbitration services that a prospective arbitrator appreciates differences in national legal systems and the reasons for the differing expectations of the parties (Drahozal 2004). Giles Cuniberti argues that the use of the contemporary law merchant to decide disputes may create an agency problem between arbitrators and parties and that a solution to the problem would be in requiring arbitrators to apply sufficiently precise transnational rules limiting their discretion. Such rules, Cuniberti argues, would be produced by organizations like UNIDROIT and private law makers like the ICC (Cuniberti 2014).

If this discussion has left you largely unsatisfied, this is probably the appropriate reaction. The outcome of the debate is inconclusive at best. Some clarity may begin to emerge once we move to the external points of view offered in sociological and economic accounts, explored in Part V, though we should not expect too much from the social sciences.

B. *Transnational Commercial Law*

Another way to answer questions about whether a contemporary law merchant exists can be found in the transnational commercial law movement, which can be called the “Oxford school” on the law merchant, emanating from the work of Roy Goode and others at Oxford.

The transnational commercial law approach is closer to the wide view of the law merchant that Schmitthoff and others have offered, though it redefines the project as one of elaborating a transnational commercial law and not a *lex mercatoria* or law merchant. Transnational commercial law is defined as “that set of private law principles and rules, from whatever source, which governs international commercial transactions and is common to legal systems generally or to a significant number of legal systems” (Goode, Kronke, & McKendrick 2015). But transnational commercial law is not the *lex mercatoria*, which is confined to what Roman lawyers called the *ius non scriptum*, so that the *lex mercatoria* is only that part of transnational commercial law consisting of “unwritten customs and usages of merchants, so far as these satisfy certain externally set criteria for validation” (Goode, Kronke, & McKendrick 2015). Note the connection to legal positivism: the need for some rule or process to “validate” the rules. As Goode elaborates, “[m]y own preference is to confine the *lex mercatoria* to international trade practice” (Goode 2005). Goode continues: “To

equate the *lex mercatoria* with the entirety of transnational commercial law deprives use of a useful label to denote that part of transnational commercial law which derives from the international practice of merchants” (Goode 2005). Goode wants to confine the concept of the *lex mercatoria* to true customary law. He distinguishes conventions, standard form contracts, and codes of practice promulgated by “international business organisations” from the *lex mercatoria* to avoid confusing customary law, “surely the essence of the *lex mercatoria*,” with contract and treaty law, and to “treat as a homogeneous mass things that are quite different in character” (Goode 2005).

The transnational commercial law approach avoids taking a position on whether its sources comprise an autonomous legal order but acknowledges the debate. It is eminently practical. The answer is that it likely is amenable to Schmitthoff’s view of autonomy tempered by sovereign control of some of its major sources. Ralf Michaels aptly explains that the distinction between an “a-national’ versus a state law is false. Rather, he argues the focus should be on an emerging global commercial law that is transnational, combining elements of national and a-national law. The focus, according to Michaels, should be functional (Michaels 2007).

In a transnational commercial law approach, the *lex mercatoria* is comprised mainly of trade usages. A trade usage requires frequent use, a sense of obligation like the *opinio juris* requirement for custom in public international law, and some identifiable recognition criteria to be able to identify trade usages (Toth 2017)(Goode, Kronke, & McKendrick 2015)(Goode 1997). A usage that is truly international cannot depend on its existence based on a decision by a national court or national law. Rather, arbitral tribunals can validate international usages, but this does not mean that a truly a-national law merchant exists, as these tribunals depend on the *lex loci arbitri* for their jurisdiction (Goode 1997). International conventions between states can operate concurrently with usages, create usages, or replace them (Goode 1997).

Trade usages and general principles of law are distinctive but related. Once a usage has acquired such general acceptance as to be independent of any particular form of international commerce, it “becomes elevated” to a general principle of law and ceases to be part of the *lex mercatoria* (Goode, Kronke, & McKendrick 2015)(Goode 1997). This elevation does not appear automatic, however, in that there

are no general principles of *commercial* law. General principles of law are “undoubtedly a source of transnational commercial law” but they are distinct from an evolved custom of merchants in the form of trade usages. The analogous distinction exists in public international law, where custom is distinguished from general principles of law (Goode, Kronke, & McKendrick 2015).

In sum, the idea of a transnational commercial law can be understood as a less theoretical and more state friendly alternative to the more civilian influenced notion of an autonomous and de-territorialized legal order governing global commercial transactions and commercial dispute resolution. The accounts discussed here may be seen as ways of ordering how to think about global legal pluralism of commercial law norms.

V. SCHOOLS OF THOUGHT ABOUT PLURALISM IN COMMERCIAL LAW

This Part surveys important schools of thought about how to understand or explain the pluralism found in the sources of norms governing commerce. These schools of thought run the gamut from accounts grounded in economics of law to critical approaches. Given the diversity of the approaches in different disciplines found in this Part, researchers ask different questions and the answers they produce rarely run parallel or track. For example, the positivist accounts of commercial legal pluralism seek to identify the validity conditions for norms that might properly be characterised as legal and seek to describe a commercial legal system. Critical accounts, on the other hand, do not evaluate the pedigree of norms but focus on normative questions about the socioeconomic effects of commercial norms in a world of economic globalisation. Sociological accounts offer a diverse range of approaches to the study of law and institutions, including systems theory, approaches offering thick descriptions or “ecologies,” and empirical work based on surveys. Economic accounts are also rich in empirical investigations and focus on explaining the behaviour of merchants based on rational choice theory. Another strand in the law and economics literature is based in political economy examines how institutions and law-making processes affect the incentives of the participants in law-making processes to produce particular kinds of legal instruments.

A. *Law and Economics*

An animating notion in research on commercial law pluralism in law and economics is in investigating ways in which transactors in a market can or cannot maximise their preferences by ordering their affairs and resolving disputes privately, often with state law and courts in the background. This research offers evidence of private ordering and how official state commercial law relates to private ordering. Another line of research explores the political economy of domestic and international institutions that produce commercial codes and other legal products. This latter strand of research raises questions of whether the participants in so-called private law-making in private legislatures has the right incentives to improve the law.

Robert Cooter organises the animating ideas in his discussion around a division of centralized versus decentralised law and analogizes it to plan versus market. He distinguishes the positivist from the economic approach to evaluating the role of custom. According to Cooter, “Hart’s critique of customs resembles a socialist’s critique of markets” (Cooter 1996). He advocates three steps for courts to use in what he calls structural adjudication of the law merchant. First, identify the actual norms that have arisen in specialised business communities. Second, identify the incentive structure that produced these norms. Third, enforce norms arising from efficient incentive structures (Cooter 1996). Most law and economics scholars do not find or assume that merchant norms, or any other extra-legal norm, are necessarily efficient unless they take a strict libertarian view (Benson 2011). The libertarian point of view, moreover, is not necessarily economic in approach. Applying game theoretic insights to the study of norms informs us that there may be multiple equilibria that are possible and that the one equilibrium that has been successful may not be efficient (Carbonara 2015). Much of the work on repeat play games has been used in explaining some behaviour by merchants. For a standard rational choice account, *see* (Posner 2000).

Gillian Hadfield argues in favour of splitting the production of law and its enforcement into two categories: law and legal enforcement that has to do only with markets and efficiency should be privatized while law that has to do with justice and democratic legitimacy should remain in the traditional institutions of government and the courts. The idea here is that law serves differentiated and plural functions. Hadfield’s proposal is not only recognition of private ordering by merchant communities but a wholesale outsourcing of commercial law to firms specializing in

the development of contract regimes that are responsive to the demands of commercial entities and that will thus produce rules and enforcement institutions that these entities prefer. She suggests some hybridization with a shift of government involvement in “organizational regulation” but not “substantive regulation,” meaning government engagement in regulating firms to which private transactional law for commercial entities is outsourced (Hadfield 2001)(Hadfield & Talley 2006). She bases these arguments on errors in the historical account of the law merchant (Hadfield 2000). Bozovic and Hadfield build on Stuart Macaulay’s seminal 1963 article on relational contracting, which is in the law and society tradition. They find that firms engaged in innovation-related industries use highly specified formal contracting extensively but do not enforce them in courts. They distinguish these firms from those not involved in innovation, who tend to rely on relational contracting across the board (Bozovic & Hadfield 2015).

Influential work on the relevance of custom in commercial matters are Lisa Bernstein’s series of articles on custom and the American Uniform Commercial Code (Bernstein 1992)(Bernstein 1996)(Bernstein 1999)(Bernstein 2001)(Bernstein 2014)(Bernstein 2015). Bernstein summarizes this work in her talk at the Thirteenth Annual International Conference on Contracts (Bernstein 2017). Bernstein’s work is classified as within law and economics because it relies on insights from economics based in rational choice and game theory. It also connects to a significant literature in law and economics on a need to return to a more formal approach to contract law and its application and development in the courts. Her work connects to a trend in the law and economics literature in the late 1990s and early 2000s towards support for a formal approach to commercial contract law and litigation (Morgan 2013)(Charny 1999)(Ben-Shahar 1999).

In her first empirical study of the diamond industry, Bernstein found that the diamond industry “has systematically rejected state-created law,” preferring agreements whose norms and enforcement are outside the official legal system because transactors value secrecy, find litigation unattractive, and expectation damages are an unsuitable remedy (Bernstein 1992). She found two extra-legal contract regimes in the diamond industry, both grounded in reputation: (1) one formed by an ethnically homogeneous group, small and geographically concentrated, engaging in repeat transactions and (2) another serving an information-intermediary

function, in which technology links markets and secures rapid, low-cost dissemination of information about reputation. The second grouping reflects the industry trend. Bernstein found that the success of these regimes in the diamond industry depends substantially on the ability of the system to expeditiously resolve disputes and enforce judgments. Bernstein concludes that the diamond industry evidence supports the hypothesis that extra-legal norms override legal rules when group members believe that compliance with the norms advances their interests, or in other words, compliance must be Pareto superior (Bernstein 1992). Robert Ellickson found similarly in his study of the whaling industry (Ellickson 1989).

After her research on the diamond industry, Bernstein's work took a two-fold focus on studying extra-legal norms and also in evaluating how those norms relate to the incorporation strategy of the American Uniform Commercial Code (UCC). Bernstein finds, in the words of the legal historian Morton Horwitz, that the UCC gave custom "undeserved normativity" (Horwitz 1991).

In her 1996 study of the National Grain and Feed Association (NGFA) in the United States, Bernstein found that the arbitrators in NGFA's extra-legal system of dispute resolution were reluctant to use UCC sources of norms in the form of usages of trade, course of dealing, and course of performance in their adjudication. She found that they took a formalistic approach to adjudication and followed a strict hierarchy of norms: (1) contract terms, (2) trade rules composed in written form, (3) trade practices, and (4) official law in the form of the UCC and statutes. NGFA arbitral rules prohibit the use of unwritten customs and trade usages to vary or qualify the meaning of explicit contract provisions and allow their use only when the NGFA trade rules are silent. Course of performance and course of dealing are even more restrictively used and very rarely form an explicit basis for an arbitral award (Bernstein 1996).

Bernstein's also builds Macaulay's seminal work (Macaulay 1963). She argues that transactors allocate aspects of their relationship between legal and extra-legal realms to maximize the value of the transaction (Bernstein 1996). Distinguishing between relationship preserving and end game norms, Bernstein argues that parties do not necessarily want extra-legal norms built around cooperation to apply in dispute resolution involving end games. The most important reason for allocating aspects of

the agreements to different realms rests on the distinction between observable and verifiable information. Contract provisions are intended to deal with untrustworthy parties, but extra-legal norms are for situations of trust (Bernstein 1996).

Bernstein contends that the UCC makes it difficult for parties to select a value maximising combination of legal and extra-legal norms. She finds that contrary to the definition of an agreement in UCC Article 2 on the sale of goods, rational transactors do not necessarily want course of performance, course of dealing, or usages of trade to fill gaps in contracts. In applying the UCC, courts have done the opposite of NGFA arbitrators, using course of performance, course of dealing, and usages of trade to vary or even override express contract provisions. Add to this the liberal use by courts of the UCC's good faith provisions and it could be said that the judicial resolution of disputes is far removed from the approaches deployed in trade association arbitration (Bernstein 1996).

In her study of hay, grain and feed, textile and silk industries, Bernstein found no widespread agreement on custom and terms of trade as these are understood in the UCC (Bernstein 1999). Her interviews of industry members revealed that they "may not consistently exist, even in relatively close-knit merchant communities" (Bernstein, 1999). She found possibly "loose behavioural irregularities," often of limited geographical scope or conditional in form. She also found that merchants distinguished written from unwritten custom (Bernstein 1999).

Bernstein distinguishes weak form from strong form customs, a distinction also recognized by Richard Craswell (Craswell 2000). Weak form customs provide transactors with a pool of common knowledge, so they can assess trust, to facilitate repeat dealing. These are not strong form customs in the Hayekian sense, whose existence the UCC assumes. Parties do not view written custom, and far less unwritten custom, to be on par with contract provisions. But the UCC incorporation strategy is based in the notion of strong form custom: fill gaps with custom because custom is more likely efficient because it has evolved through natural selection of rules and practices. Bernstein finds this untenable based on what we know from modern behavioural game theory and psychology (Bernstein 1999). Game theory informs us that behavioural regularities may or may not be efficient and evolution can be highly path dependent and influenced by information cascades and heuristics and

biases. There is no reason to believe strong form customs exist which can produce legally enforceable contract provisions (Bernstein 1999). The evidence therefore casts doubt on custom being able to offer a set of gap fillers as assumed in the UCC. There is, however, evidence of weak form customs on what might be expectations about the way business is conducted in specific industries, forming a set of relationship preserving norms (RPNs), enhanced with trade rules of private legal systems, where reputation on its own is insufficient to support exchange with strangers. RPNs, however, are not gap fillers. They are distinguishable from end game norms (EGNs), which parties want contracts to include (Bernstein 1999). For another detailed examination of the game theoretic constraints on the evolution of norms, *see* (Aviram 2004).

In her 2001 article on the cotton industry, Bernstein found that “[t]he cotton industry has almost entirely opted out of the public legal system, replacing it with one of the oldest and most complex systems of private commercial law” (Bernstein 2001). The cotton industry at both the US domestic and international levels relies on association-drafted standard form contracts subject to arbitration. The major difference between courts and cotton industry tribunals is in the application of trade rules: the UCC directs courts to look to “immanent business norms” reflected in course of dealing, course of performance, and usages of trade to fill gaps and interpret contracts. Tribunals engage in a “relatively formalistic adjudicative approach” with “little explicit weight to element of the contracting context” even if fairness dictates a different decision (Bernstein 2001). Trade rules do not make usages of trade, course of performance, and course of dealing relevant to gap filling or interpretation and only very rarely look to custom when no trade rules or contract provisions are on point. Custom is not even mentioned in association-produced trade rules. She finds that compliance rates with arbitral awards are very high because failure to comply with trade rules can lead to expulsion from a trade association, a severe sanction that is widely publicized, reputational sanctions, and association-imposed penalties (Bernstein 2001).

One of Bernstein’s more recent articles more directly critiques the UCC incorporation strategy, which she says rests on the notion that compared to a formal adjudicative approach, the incorporation of immanent business norms into commercial contracts will reduce specification costs without unduly increasing

interpretive error costs. Bernstein finds these assumptions to be “highly questionable” because parties rely on their own unreliable or interested testimony to prove immanent business norms in American courts and not objective evidence such as expert witness testimony, trade codes, or statistical evidence that a practice is widely observed. The result is that the incorporation strategy likely increases both specification and interpretation error costs. Bernstein advocated abandoning it in favor of a more formalistic approach to contract interpretation (Bernstein 2015).

Clayton Gillette offers a somewhat different response to the CISG (and UCC) incorporation strategy and at least a partial rebuttal of Bernstein. Gillette argues that while the existence of trade usages, which he refers to as a “pattern of behavior” and more generically as custom, do not necessarily imply that the parties have efficiently allocated risks, the application of custom can reduce costs of contracting and it is unclear whether a noncustomary default rule would be more efficient. He goes through CISG cases to make his point. Avery Katz builds on Gillette’s findings (Katz 2004).

Of course, a substantial diversity of approaches can likely be found in close-knit merchant communities, based in historical conditions, path dependence, and incentives. While Bernstein offers evidence of a substantial infrastructure of extra-legal norms at work in business communities, other examples can be found of merchant communities relying on state law and state-created dispute resolution institutions. Eric Feldman’s work on Japan’s tuna court is just such an example (Feldman 2006).

Though the law and economics research significantly advances our understanding of the role of extra-legal norms in commerce, the research is subject to several limitations. The literature is unclear on the concept of custom. For example, the trade rules of trade associations that Bernstein uncovers would be classified as usages of trade or custom by those who study the law merchant but not in the law and economics framework. Nor is the law and economics literature clear on the concept of what would constitute formal contract law and adjudication. The law and economics literature lacks an appreciation of the distinction between behavioural regularities that carry with them a sense of obligation and those that do not. An obvious distinction in approaches outside of law and economics distinguishes behaviour in the form of

conduct from norm-governed behaviour the breach of which is considered wrong in some sense. Most who have studied the law merchant would find it problematic to classify mere statistical regularities as custom. There is a significant difference between a pattern of behaviour and norm governed behaviour. Moreover, the literature is silent on what merchants who do not form rule-producing associations prefer. Finally, the law and economics research on merchant norms is based on rational choice and requires a substantial updating to consider advances in the behavioural sciences. An alternative explanation for Bernstein's preference-based account may be based on the heuristics and biases and fairness and reciprocity norms of merchants. A major weakness in the norm theory work in law and economics is it is based on a dubious assumption of rationality.

Finally, a literature exists in the political economy tradition investigating the incentives of law-makers in so-called "private legislatures." In this research, private legislatures are law-making bodies that are not part of the state legislative apparatus, or at least not directly so, like UNCITRAL and UNIDROIT, making rules for eventual adoption by states as model laws or conventions. This work started as investigations of the work of the American Law Institute (ALI) and the National Conference of Commissioners of Uniform State Laws (NCCUSL), organisations in the United States responsible for producing and amending the U.S. Uniform Commercial Code. The most well-known research in the field is probably Alan Schwartz's and Robert Scott's "The Political Economy of Private Legislatures" though there is other work (Schwartz & Scott 1995). Political economy insights have been extended to global law-making (Gillette & Scott 2005) (Stephan 1997)(Stephan 1999). There has been some work in rebuttal (Linarelli 2003). This political economy research, based in rational choice theory, assumes that law-makers are rational and self-interested, just like everyone else. When law-makers operate within the law-making environment, what is known in positive policy theory as a "structure-induced equilibrium" results from specifying the utility functions of the law-makers in the law-making process and the institutional structures that transform the preferences of the law-makers into outcomes in the form of legal products. This model building is intended to explain the features of the legal products deriving from the law-making process under investigation (Schwartz & Scott 1995). Variants on this approach can be found in public choice theory and more generally in the methods of political

economy. The outcome of this research is that the output of legal rules is a function of the preferences of interest groups in the structure in which they operate and not of policy choices made to improve the rules.

B. *Law and Society*

There is a group of accounts about the pluralism of commercial law that can very roughly be classified as “law and society” accounts because of their connection to sociological approaches to the study of law and institutions. This categorization may be subjected to criticism for at least two reasons. First, no agreement exists on what legal sociology precisely entails, with various school of thought approaching the subject and with approaches that vary between North America, the United Kingdom, and continental Europe. Second, some scholars placed in this camp in this chapter are multidisciplinary: their work also partly relies on law and economics, for example. Some legal sociologists, moreover, are theoretical in approach while others are empirical. Nevertheless, some attempt at taxonomy seems in order, and the law and society classification seems to capture the affinities among these disparate approaches than most others.

One of the most influential theories about pluralism in commercial law is Gunther Teubner’s account of the *lex mercatoria* as an autopoietic system. This is a social theory about law originating in the work of the German sociologist Niklas Luhmann (Teubner 1997)(Michailakis 1995). It is also known as systems theory.

A system is autopoietic when its processes produce the components of the system constituting the system itself and necessary for the system to continue. The concept comes from biology, in which systems produce life, while in social systems what is produced is meaning. The components of an autopoietic system for a social system like law are communications that come in a grammar in the form of a binary legal code of legal/illegal. A key concept in systems theory is functional differentiation: the social world is composed of self-regulating systems related to each other, but which are closed and independent of each other. Relations between a closed system, such as the *lex mercatoria*, and other systems, such as the global economy, are relationships between the system and the external environment. Functional differentiation means that systems are not stratified. We cannot look only to a single system such as “society” or “economy” as a hierarchically higher or superior system but rather study

each system with no single system covering all of society or an economy. Luhmann eliminated hierarchy and stratification from legal sociology.

A legal system determines what it is as a matter of self-reference and in accordance with law. Law's binary code of legal/illegal makes law a normatively closed system, to be distinguished from moral codes of right/wrong or good/bad or a science code of true/false. Closed does not mean isolated. Systems theorists use the concept of "coupling" to describe the interchange between systems and environment and "structural coupling" to describe continual interchanges. The environment does not make changes to a system but triggers when changes might be needed. Systems theory is a more robustly sociological alternative to legal positivism.

Teubner has used of systems theory to offer an attractive explanation of the contemporary law merchant or what he calls the *lex mercatoria* (Michaels 2007). Systems theory allows us to discard the hierarchy that puts national legal orders at the top of the hierarchy and which then places doubt on the validity of legal orders that do not find their validity in the law of the nation-state. Law made in a domestic constitutional order is simply one system of law and not deserving of a privileged place in determining the validity of legal rules of other legal systems. Other "governments" can make law as well. For Teubner, the law merchant is a closed system of global law. His account offers a defence of the "phantoms of the Sorbonne professors" that have been outlined in the above Part IV (Teubner 2002). His theory may not support a "mixed" legal system such as that proposed by transnational commercial law theorists as such a system is open and borrows validity procedures from other systems. Teubner explains how international arbitrators make law as follows:

Whenever arbitrators have constructively distorted economic realities by reading legal rules into them, they have actually enacted a new positive law which is unambiguously law and nothing else. *Lex mercatoria* is genuinely part of global legal system. It contains legal elements and nothing but legal elements, to be sure, the boundaries between the legal and the social are always blurring. But it is the productive misreading by the discursive practice of *lex mercatoria* that relentlessly defines and redefines its own boundaries. The process of "framing," of drawing the boundary, of self-definition is never finished (Teubner 2002).

Not all sociological approaches to study the pluralism of commercial law are grounded in systems theory. Other very influential work in a law and sociology

framework is Yves Dezalay's and Bryant Garth's book, *Dealing in Virtue*, on the rise of international commercial and investment arbitration and the role of lawyers and academics in various national traditions in resolving north-south commercial and investment conflicts. This work grounds in French sociologist Pierre Bourdieu's concept of a field and has affinities with new institutionalism in sociology, with network analysis, and with political science research on epistemic communities and transnational issue networks (Dezalay & Garth 1996). This research is based on extensive interviews of arbitrators and lawyers. It is rich in empirical findings and tells us a great deal about the state of the debate between mercatorists and statistes outlined in the above Part IV. Dezalay and Garth expose a competition for arbitral business between the "grand old men," prominent professors of commercial law in continental Europe, who argue for the use of general principles as a form of *lex mercatoria*, and a younger generation of technocrats, practitioners in Anglo-American law firms and schooled in the adversarial style of US litigation. With the rise of the technocrats comes the decline of the *lex mercatoria*, though new standard form contracts and contract practices have begun to supplant the *lex mercatoria* as conceived by the learned academics who relied upon it in arbitration. Dezalay and Garth go into how arbitrators from both camps were involved in resolving major north-south disputes in the 1970s and 1980s, transforming political and economic disputes into business disputes, often serving as agents both for developing countries and for the promotion of their own approaches to the law and dispute resolution, with the major oil arbitration of the period serving as the "founding acts" for their profession. Dezalay and Garth offer a typology for understanding now states who serve as seats of arbitration play their roles, with common law countries, in particular England, exemplifying a model of delegated justice and Sweden a model of parallel justice (Dezalay & Garth 1996).

The work of Susan Block-Lieb and Terence C. Halliday, reflected most centrally in their book, *Global Lawmakers*, employs a sociological approach known as the Chicago School in undertaking a detailed study of UNCITRAL and its work on its Legislative Guide on Insolvency Law (Block-Lieb & Halliday 2017). With its influence in the Chicago School, the book seeks to uncover the "ecologies" of the making of commercial law at the international level. The work is based in extensive data, fact-finding, and fieldwork by the authors, who also participated in the law-

making process. It offers insights into competition and collaboration among various international organizations. This work is perhaps the most recent detailed empirical work on how international commercial law is produced.

Another important work that may be broadly understood to fall within the law and society approach to examining the pluralism of commercial law is that of Galf-Peter Calliess and Peer Zumbansen, though their work is significantly multidisciplinary and defies categorization. They argue that theorising about transnational private law is not feasible without a high degree of multidisciplinary inquiry (Calliess & Zumbansen 2010). Calliess and Zumbansen offer an “explanatory and constructive tool to describe, assess and further develop the different law-making regimes that can be observed in the transnational arena” (Calliess & Zumbansen 2010). They seek to explain examples of transnational private law through what they describe as a methodological approach: “we understand transnational law above all to demarcate a methodological position rather than to identify a perfectly map-able doctrinal field” (Calliess & Zumbansen 2010). They borrow from discussion of internet governance the notion of “rough consensus and running code” (RCRC), which they describe as “a dynamic process of consensus building and code evolution” that can capture the how transnational law-making occurs (Calliess & Zumbansen 2010). The authors locate their work in the context of projects studying law and globalization. They admit that “with such an orientation, the net is -admittedly- cast wide,” placing their work within the ambit of a diverse range of research. They use the *lex mercatoria*, which they define as “one of the most important laboratories to reflect on the elements of a legal order emerging at a critical distance from the state” as a significant example of a methodological problem on how to approach the possibility of law “which can be but need not be state-originating, which can be but need not be privately created or resulting from a complex interaction between official and unofficial norm-creation.” *Lex mercatoria* in their conception is thus a hybrid. They evaluate transnational law from the public/private divide, the difference between coordinative (private law) and regulatory (public law) legal functions and, the substantive and procedural aspects of legal process. RCRC facilitates a discussion whether transnational private law is law by pushing the substantive inquiry into the procedural, focusing on a bottom-up approach to law-making that will assist in overcoming the obstacle of a limited nation-state focus. After developing the framework for analysis, the authors undertake

two case studies, one on transnational consumer contracts and the other on transnational corporate governance. The authors argue that RCRC will help in developing our understanding of law and social norms, soft law, and customary international law (Calliess & Zumbansen 2010).

C. Critical Accounts

This section examines approaches to the study of the pluralism of commercial law in ways that are evaluative, critical, and normative, in studying whether the privatization of commercial law is legitimate or otherwise appropriate. This section will focus on a prominent set of insights on this question that comes from a critical school of thought, as it is found in the work of A. Claire Cutler and Stephen Gill, known as a new constitutionalism of disciplinary neoliberalism (Gill & Cutler 2014). It will also cover how lawyers from the Global South have resisted the application of the law merchant. Finally, we will briefly cover how critical legal theorists have examined the law merchant, though they have covered the field tangentially.

A. Claire Cutler's and Stephen Gill's work is likely the most important in the critical tradition as it relates to plural legal orders of a modern law merchant. Cutler in particular takes on the law merchant for its role in establishing a neoliberal global legal order that privatizes the production of law, avoiding the requirements of democratic legitimacy in the process (Cutler 2003).

In her seminal work in the field, Cutler argues:

fundamental transformations in global power and authority are enhancing the significance of the private sphere in both the creation and enforcement of international commercial law. State-based, positivist international law and "public" notions of authority are being combined with or, in some cases, superseded by nonstate law, informal normative structure, and "private" economic power and authority as a new transnational legal order takes shape. Transnational commercial law or the new law merchant is an integral component of this emerging transnational legal order" (Cutler 2003).

This Gill and Cutler collectively place within the concept of a new constitutionalism, which is the political-legal counterpart to disciplinary neoliberalism, a process of intensifying and deepening market approaches to organising social orders and thereby increasing the power of capital and transnational corporations.

While some of Cutler's work relies on a questionable historical account of the law merchant, she has also explained how authority can arise from cooperation (Cutler, Haufler, & Porter 1999). One does not have to accept, moreover, a strict conception of historical materialism to argue that history matters, even in its symbolic form. Calliess and Zumbansen have argued that accounts that focus too much on history ignore the significance of the law merchant in the larger debate on juridification and on distinguishing law from non-law (Calliess & Zumbansen 2010).

For a series of papers broadly taking a critical approach see (Hall & Biersteker 2002) (Cutler, Haufler, & Porter 1999). The work in transnational legal theory of Calliess and Zumbansen outlined in the preceding section could also be said to be in a critical tradition in examining the democratic legitimacy of transnational private law, the rise of market participants as political citizens, and in putting the public private divide in some tension (Calliess & Zumbansen 2010)(Zumbansen 2002).

Work by international lawyers sympathetic to understanding the aims of developing countries have taken a critical stance on the use of general principles of law by arbitrators, which they argue favours the interests of investors from developed countries at the expense of people in developing countries. One of the principal protagonists in this debate is M Sornarajah, who has a long history of writing on this subject going back to the early 1980s and during the advent of the New International Economic Order. His work falls with the Third World Approaches to International Law (TWAAIL) school of thought. Sornarajah has made a number of arguments against general principles in particular and transnational law in general. According to Sornarajah and TWAAIL scholars, the "general principles of law recognized by civilized nations" language used by arbitrators and found in the International Court of Justice Statute Article 38(1) largely tracks an earlier age in which "civilization" referred only to Europe. Counsel for foreign investors and arbitrators from investor states sought to locate foreign investment law in public international law to override the constitutional power of the state but they did so only in relation to poor states. They interpreted a transnational law to have this overriding feature in a selective way, ignoring other general principles supporting the uncontroversial principle that private party autonomy cannot defeat mandatory principles of public law (Sornarajah 2015)(Linarelli, Salomon, Sornarajah 2018). Sornarajah makes the case against the

misuse of general principles and transnational law in his early examination of oil and natural resources arbitration (Sornarajah 1981).

A postmodern account of the *lex mercatoria* can be found in Boaventura De Sousa Santos' *Toward A New Legal Common Sense*, though Santos might resist the postmodern classification (Santos 2002). Santos argues that a paradigmatic transformation is occurring between modernity and "another emergent time" for which we have only signs but do not yet know. According to Santos, modernity is a "sociocultural paradigm" based on a tension between social regulation and social emancipation, which has totally run its course, and has lost all its regenerative capacities. Santos argues that an oppositional postmodernism informs us that modern problems have no modern solutions. To Santos, modernity has produced legal institutions that cannot fulfil either the promises of modernity itself or a future we have yet to see but which is showing signs of emergence. The law merchant is one of the many legalities under Santos' scrutiny. He contends that the contemporary law merchant is a "globalized localism," a local phenomenon that is successfully globalized. According to Santos, it is not a globalized legal culture. The relevant local phenomenon when it comes to the law merchant is a set of practices designed to promote capital accumulation for transnational corporations, dominated by American interests and American corporate law firms.

Finally, at least one critical legal theorist taken some view of the law merchant. It is unclear whether this work belongs in the above law and society discussion. Work in critical legal studies defies categorisation. In *Law in Modern Society*, Roberto Mangabiera Unger examines the role of law in societies and how the bases for rule of law emerge in advanced capitalist societies, with a focus on understanding what law can tell us about hierarchy and authority in societies. On how western legal orders arose, Unger argues:

the decisive event was the success of established aristocracies or of an emergent "third estate," composed of merchant and professional groups, in preserving or acquiring a measure of independence from the monarchs and their staffs. Were it not for this success, however limited and transitory, the rule of law ideal might never have won its preeminent place in the modern West (Unger 1976).

According to Unger, what happened in modern Europe was a "breakthrough" that "made it possible to fuse the two bodies of law into a legal order that differed from

both its parents” (Unger 1976). This was the result of compromise leading to cooperation of monarchic bureaucracy, aristocratic privilege, and middle-class interests. Middle class interests needed some protection from rulers when they were not masters of the state and so supported rule of law (Unger 1976).

D. *Positivist Accounts and Norm Recognition Strategies*

There was some debate whether legal positivism could provide an adequate description of legal systems that are not confined to the traditional legal system as it is found in states. Jeremy Waldron, for example, has been critical of Hart’s Chapter 10 in *The Concept of Law* and its hindering of legal positivists from paying appropriate attention to international law (Waldron 2013). The response to this critique would be that legal positivism is meant to be a general jurisprudence. There has been some branching out into trying to understand traditional forms of public international law from the standpoint of legal positivism but there has been less focus on whether positivism can adequately describe or elucidate the validity conditions for the law merchant or a transnational commercial law, though there have been some moves in this direction (Linarelli 2009a)(Schultz 2014)(Toth 2017).

Linarelli offers a transnational or cosmopolitan version of legal positivism, to be contrasted with the more traditional state-based version (Linarelli 2009a). He argues that the main worry about positivism as an account to describe the law merchant or a transnational commercial law is its total reliance only on single states and their officials for secondary rules. The traditional notion of positivism is as an account of state dominated, municipal, territorial, legal systems, which he classifies as the political conception of positivism. Linarelli argues that a transnational conception of positivism is possible, removing the state as an enabling condition for a legal system. He argues that a transnational conception of legal positivism requires that five conditions be met: (1) acceptance by the participants in the legal system of the rules of the system as valid, binding, and authoritative; (2) systemic qualities of normative consequence within the putative legal system that make the normative order that the system represents intelligible or comprehensible to the participants; (3) secondary rules and secondary rule officials, though they can be distributed across different state and non-state hierarchies; (4) shared agency between secondary rule officials demonstrating sufficient mutual responsiveness and joint commitment to a legal

system; and (5) primary rules dealing with issues that legal systems usually deal with, such as property, contract, and dispute resolution (Linarelli 2009a((Linarelli 2009b). Linarelli offers a version of legal positivism connecting to positivist accounts based in the notion of law as planning or “massively shared agency” (Shapiro 2013). His account is one about a distributed space for a legal system in which rules of recognition and other secondary rules may be shared. Sweet and Grisel offer evidence of how judicialization of dispute resolution can result in feedback effects as between arbitral tribunals and national courts in interpreting the New York Convention on Enforcement of Arbitral Awards (Sweet & Grisel 2017).

Toth’s account grounds closely to Hart and starts with a focus on what constitutes a primary customary rule. Borrowing from public international law, she argues that a customary rule is established by proving (1) use and (2) *opinio juris* or a sense of legal obligation. She acknowledges the circularity of the criteria: it prescribes a rule to be followed out of a sense of legal obligation before the legal obligation arises. She argues that Hart’s notion of a critically reflective attitude provides the *opinio juris* element with fact-based criteria upon which to determine whether a legal rule exists. The way out of the circularity, she contends, is to focus not simply on isolated rules but on questions about a legal system. Moving on to Hartian secondary rules, she starts with the rule of adjudication, which she reshapes into the terms of adjudication, given the contractual nature of international commercial arbitration. She argues that the rule of adjudication is a precursor to a rule of recognition. The problem she identifies with rules of adjudication is that they are not from the *lex mercatoria* but are state-based rules and that this is contrary to Hart’s claim that primary and secondary rules are supposed to be from the same legal system. Here she looks to the function of rules of adjudication and finds that arbitration fulfils a function of a rule of adjudication. She contends that once an arbitral tribunal finds a violation of *lex mercatoria*, the *lex mercatoria* moves closer to a form of “efficacious legal control” because a legal sanction now attaches to the violation. She argues for a similar transformation of the rule of recognition, looking to the function of the rule of recognition. She argues that “a-national recognition criteria” exist, applied only by arbitrators according to the terms of adjudication, in the form of the two-part test to determine whether a primary rule exists. To deal with Hart’s concern about the static

nature of custom, Toth finds that functionally the *lex mercatoria* maintains built-in mechanisms for change (Toth 2017).

Well-rehearsed critiques of positivist accounts of the law merchant they are incomplete, question-begging, and a parochial approach placing too much emphasis on state law. Gaillard, for example, says in connection with reliance on Hartian jurisprudence

It nonetheless remains an assumption; simply, the assumption lies in the choice of the supporting philosophy rather than in the presentation of the concept that is being promoted. The resulting benefit is to present a mere allegation as the inescapable conclusion of a compelling reasoning. The statement remains a pure argument by authority. It would suffice to change the philosophical postulate to reach the exact opposite result.

Gaillard goes on to explain that his theory is based in positivist postulates (Gaillard 2010).

VI. SOFT LAW AND GLOBAL FINANCE

International economic law, the international law governing economic relations between states, divides into three branches for trade, investment, and finance. International trade is highly legalized, governed by substantial treaty law in the form of multilateral and plurilateral agreements under the umbrella of the World Trade Organisation (WTO), as well as a plethora of regional and bilateral trade agreements. State-to-state dispute settlement is the norm in trade relations between states, with the WTO Dispute Settlement Body sitting at the apex of a legal system to decide trade disputes between WTO member states. Foreign investment law is a mix of bilateral investment treaties, customary international law, and general principles of law. As authorized by treaty, investor-state arbitration resolves disputes between states and foreign investors. Much of the above discussion about general principles and the *lex mercatoria* are relevant to investor-state arbitration, though most investment arbitrations concern issues of treaty application and interpretation.

Few norms governing global finance, however, derive from traditional legal sources as they are understood in public international law. Chris Brummer has shown that many of the norms governing global finance are soft law, though the concept of soft law itself is contested (Brummer 2015). He argues that states engage in high levels of compliance with these soft law norms.

Law as it is conventionally understood has a narrow role in the post Bretton Woods regulation of global finance. The International Monetary Fund (IMF) and World Bank, both constituted by treaty in the form of Articles of Agreement among states, do not do much by way of regulating finance in a traditional sense. They engage mainly in monitoring. Most of the norms for global finance are informal agenda setting standards for countries to rely upon to produce domestic financial regulation. The institutions producing these norms tend to not be creatures of treaty. They operate mainly by consensus and coordination, overseen by central banks, domestic regulatory agencies, and finance ministries. Perhaps the best known of these groups is the G-20, which now largely sets the broad agenda for international standards, and the Financial Stability Board, which has oversight over systemic financial risk. Other important bodies include the Basel Committee on Banking Supervision (BCBS), the International Organization of Securities Commissions (IOSCO), and the International Association of Insurance Supervisors (IAIS), responsible for standard setting for banking, securities regulation, and insurance. Other lesser known standard setters set standards for specific areas relevant to global finance (Brummer 2015)(Weiss & Kammel 2015). The result is that we really cannot understand the regulation of finance at the global level without consulting these non-traditional sources of norms. It therefore could be said that a robust pluralism exists in the regulation of economic relations between states.

VII. THE FUTURE

One feature that sets commercial law apart from other areas of the law is that it adapts to the practices of people and organisations engaged in commerce. These people and organizations have come to be known as merchants, a term that has been used throughout the centuries, though what might constitute a merchant has changed a great deal over the centuries. These practices in turn depend on the technology available in a given era, which merchants will use to reduce transaction costs in their transactions. It used to be that paper was the technology available to merchants to accomplish these aims, and the law accommodated by attaching legal significance to bits of paper, such as through the concept of negotiability as it applies to negotiable instruments in the forms of bills of exchange, promissory notes, and checks. Merchants and the financial institutions they rely upon can now use digital entries and code to reduce transaction costs. We are seeing the rise of a *lex cryptographica* in the

form of the distributed ledger and blockchain, which has the potential to revolutionize commercial transactions. The result is a scenario in which code replaces law (De Philippi & Wright 2018). The *lex cryptographica* may obviate the need for custom and usage and replace the law merchant in some cases.

Other tensions are being placed on the notion of a law merchant or *lex mercatoria* from other quarters. Dezalay and Garth suggest that the procedural and positive law orientation of legal technocrats is on the rise in international commercial and investment arbitration and reliance on the *lex mercatoria* may be declining. They published their work in 1996. A progress update seems warranted, based on an empirical investigation of the practices of arbitrators and lawyers in the field.

To conclude, legal pluralism will continue in commerce and finance. Its characteristics will be the subject of transformation and evolution. Some areas of transnational commercial law, such as the norm creating features of standard form contracting by professional associations, will likely remain stable. Other areas, such as the use of general principles of law, will likely evolve. New areas, such as in the development of norms around software code, will likely rise in use and prominence.

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